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Aff. affirmed
Appl. applied
Appr. approved
C. considered
D. disapproved
Dist. distinguished
E. explained
F. followed
N.F. not followed
O. overruled
Q. questioned
R. referred to in judgment
Rev. reversed

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STATUTES JUDICIALLY CONSIDERED

1800

Criminal Lunatics Act, 1800 (39 *&* 40 *Geo.* 3, *c.* 94), *s.* 2 - - - **C.C.A. 325**

1843

Scientific Societies Act, 1843 (6 *&* 7 *Vict. c.* 36), *s.* 1 - - - - - **C.A. 373**
C.A. 388

1862

Habeas Corpus Act, 1862 (25 *&* 26 *Vict. c.* 20), *s.* 1 - - **Divl.Ct. and C.A. 241**

1869

Debtors Act, 1869 (32 *&* 33 *Vict. c.* 62), *s.* 5 **C.A. 181**

1881

Fugitive Offenders Act, 1881 (44 *&* 45 *Vict. c.* 69), *s.* 7 - - - **Divl.Ct. 142**

1890

Foreign Jurisdiction Act, 1890 (53 *&* 54 *Vict. c.* 37) - - **Divl.Ct. and C.A. 241**

1893

Sale of Goods Act, 1893 (56 *&* 57 *Vict. c.* 71), *ss.* 25 (2), 47, *proviso* - **Salmon J. 159**

1907

Criminal Appeal Act, 1907 (7 *Edw.* 7, *c.* 23), *s.* 4 (1), *proviso* - - **C.C.A. 411**

—— —— *s.* 4 (3) - - - **Winn J. 117**

—— —— *s.* 19 (*a*) - - - **C.C.A. 325**

1914

Affiliation Orders Act, 1914 (4 *&* 5 *Geo.* 5, *c.* 6), *s.* 7 - - - **Divl.Ct. 635**

1924

Carriage of Goods by Sea Act, 1924 (14 *&* 15 *Geo.* 5, *c.* 22), *Sch.*, *art. III*, *r.* 1, *art. IV*, *r.* 2 (*a*) - - **C.A. 536**

1925

Supreme Court of Judicature (*Consolidation*) *Act*, 1925 (15 *&* 16 *Geo.* 5, *c.* 49), *ss.* 27 (1), 51 (1) - - **C.A. 197**

Rating and Valuation Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 90), *s.* 22 (1) (*a*) *and* (*b*), (4) **C.A. 592**

1928

Rating and Valuation (*Apportionment*) *Act*, 1928 (18 *&* 19 *Geo.* 5, *c.* 44), *ss.* 3, 4 **C.A. 592**

1929

Local Government Act, 1929 (19 *Geo.* 5, *c.* 17), *s.* 30 (1) - - - **Salmon J. 312**

1930

Road Traffic Act, 1930 (20 *&* 21 *Geo.* 5, *c.* 43), *s.* 35 (1) - - - **Divl.Ct. 367**

—— —— *s.* 36 (1) (*b*) (2) - **Salmon J. 107**

1933

Local Government Act, 1933 (23 *&* 24 *Geo.* 5, *c.* 51), *ss.* 229, 230 - **Divl.Ct. 149**

Road and Rail Traffic Act, 1933 (23 *&* 24 *Geo.* 5, *c.* 53), *s.* 33 - - **Salmon J. 107**

1939

London Government Act, 1939 (2 *&* 3 *Geo.* 6, *c.* 40), *s.* 181 (3) - - **Divl.Ct. 361**

1947

Town and Country Planning Act, 1947 (10 *&* 11 *Geo.* 6, *c.* 51), *ss.* 12, 13 (1), 23 (1) **Divl.Ct. 424**

—— —— *s.* 23 - - - - **Divl.Ct. 645**

1948

National Assistance Act, 1948 (11 *&* 12 *Geo.* 6, *c.* 29), *s.* 44 (2) - - **Divl.Ct. 635**

Criminal Justice Act, 1948 (11 *&* 12 *Geo.* 6, *c.* 58), *s.* 23 (1) - - **C.C.A. 681**

Agricultural Holdings Act, 1948 (11 *&* 12 *Geo.* 6, *c.* 63), *s.* 2 (1) - **Diplock J. 170**

1949

Landlord and Tenant (*Rent Control*) *Act*, 1949 (12, 13 *&* 14 *Geo.* 6, *c.* 40), *s.* 2 **C.A. 1**

1952

Diplomatic Immunities (*Commonwealth Countries and Republic of Ireland*) *Act*, 1952 (15 *&* 16 *Geo.* 6 *&* 1 *Eliz.* 2, *c.* 18), *s.* 1 - - - **C.A. 134**

Costs in Criminal Cases Act, 1952 (15 *&* 16 *Geo.* 6 *&* 1 *Eliz.* 2, *c.* 48), *s.* 6 (1) **Divl.Ct. 625**

Prison Act, 1952 (15 *&* 16 *Geo.* 6 *&* 1 *Eliz.* 2, *c.* 52), *s.* 25 (1) - - **Winn J. 117**

1953

Valuation for Rating Act, 1953 (1 *&* 2 *Eliz.* 2, *c.* 42), *ss.* 2 (2), 3 (*a*) (*b*) - **C.A. 217**

1955

Rating and Valuation (*Miscellaneous Provisions*) *Act*, 1955 (4 *Eliz.* 2, *c.* 9), *s.* 5 (3) - - - - **C.A. 592**

1957

Solicitors Act, 1957 (5 *&* 6 *Eliz.* 2, *c.* 27), *ss.* 46 (1), 49 - - **Gorman J. 87**

Affiliation Proceedings Act, 1957 (5 *&* 6 *Eliz.* 2, *c.* 55), *s.* 4 (2) - - **Divl.Ct. 635**

1959

Supreme Court of Judicature (*Amendment*) *Act*, 1959 (7 *&* 8 *Eliz.* 2, *c.* 39), *s.* 1 (1) **C.A. 197**

AUSTRALIA

1924

Sea Carriage of Goods Act, 1924 (*No.* 22 *of* 1924) - - - - - **C.A. 536**

STATUTORY RULES, ORDERS AND INSTRUMENTS JUDICIALLY CONSIDERED

R.S.C., *Ord.* 11, *r.* 1 (*e*) - - **C.A. 187**

Prison Rules, 1949 (*S.I.* 1949, *No.* 1073) **Winn J. 117**

Town and Country Planning General Development Order, 1950 (*S.I.* 1950, *No.* 728), *arts.* 3 (1), 4 (1), *Sch. I*, *Class XII* **Divl.Ct. 424**

Prison Rules, 1952 (*S.I.* 1952, *No.* 1405), *r.* 3 **Winn J. 117**

Lands Tribunal Rules, 1956 (*S.I.* 1956, *No.* 1734), *rr.* 31, 34, 45 (1) - **C.A. 217**

Solicitors (Disciplinary Proceedings) Rules, 1957 (*S.I.* 1957, *No.* 2240), *r.* 21 **Gorman J. 87**

ERRATA

[1959] 1 Q.B.

To Table of Cases Reported, *add*:

National Coal Board *v.* Gamble	11
South African Dispatch Line *v.* Panamanian Steamship Niki (Owners) - - -	238

Page 551: Under heading " Criminal Law " *add*:

Criminal Law — Abduction — Unmarried girl under eighteen — " Unlawful sexual intercourse " — Meaning — Sexual Offences Act, 1956 (4 *&* 5 *Eliz.* 2, *c.* 69), *s.* 19 (1).
REGINA *v.* CHAPMAN - - **C.C.A. 100**

Page 552, col. 1: For REGINA *v.* CHAPMAN *read*:

NATIONAL COAL BOARD *v.* GAMBLE **Divl.Ct. 11**

CASES

DETERMINED BY THE

QUEEN'S BENCH DIVISION

OF THE

HIGH COURT OF JUSTICE

AND BY THE

COURT OF APPEAL

ON APPEAL THEREFROM
OR FROM COUNTY COURTS

AND BY THE

COURT OF CRIMINAL APPEAL

WHITE *v.* ELMDENE ESTATES LTD.

C. A.

1959
April 22, 23, 24, 28.

Lord Evershed M.R., Ormerod and Willmer L.JJ.

[Plaint No. O. 2092.]

Landlord and Tenant—Rent restriction—Premium—Paid to third person—Grant of tenancy conditional on sale of house at undervaluation—Person requiring premium—Demand by landlords' agents—Benefit not received by landlords but by separate though associated company—Landlord and Tenant (Rent Control) Act, 1949 (12, 13 *&* 14 *Geo.* 6, *c.* 40), *s.* 2.

As a condition of obtaining for the plaintiff the grant of a tenancy of a dwelling-house within the scope of the Rent Acts, a firm of estate agents, C. & C. Ltd., required the plaintiff and his wife to sell their house to a property company, P.T.E. Ltd., for £500 less than the market value. The tenancy was granted by the defendant company which was closely associated by shareholding and directors with the other two companies, though the benefit of the £500 was not transferred to the defendant company. The plaintiff brought proceedings to recover the sum of £500 from the defendant company as an unlawful premium:—

C. A.

1959

White
v.
Elmdene
Estates
Ltd.

Held, (1) that the prohibition in section 2 of the Landlord and Tenant Act, 1949,[1] against the requiring of premiums was not limited to the payments of fines or like sums but extended to requiring, as in the present case, the deduction of a specific sum from a known or assumed sale price as a condition of the grant of a tenancy.

(2) That the prohibition was not limited to payments made to the person requiring the payment but covered this case where payment was to the order of the landlord.

Rex v. *Birmingham (West) Rent Tribunal; Ex parte Edgbaston Investment Trust Ltd.* [1951] 2 K.B. 54; [1951] 1 T.L.R. 77; [1951] 1 All E.R. 198 distinguished and dictum of Lord Goddard C.J. [1951] 2 K.B. 54, 57 questioned.

Observations of Atkin L.J. in *Remmington* v. *Larchin* [1921] 3 K.B. 404, 411 considered.

(3) That the plaintiff and his wife, as joint owners of the house sold, should be treated as having paid the premium jointly, and were jointly entitled to recover it from the landlord who required it, even though another company received it.

Appeal from Judge Leon sitting at Willesden County Court.

The plaintiff, William Alfred White, a joiner, brought proceedings to recover £500, alleged to be an unlawful premium which he had been required to pay by a firm of estate agents known as Clifford & Clifford Ltd., acting on behalf of the defendants, Elmdene Estates Ltd., to a third company known as Pegasus Training Estates Ltd. (hereinafter called " purchasers "). The defendants and the purchasers were " property " companies and all three companies were associated. The defendants and the purchasers were controlled by one Van Dooren and his family. They were also shareholders in Clifford & Clifford Ltd. and Van Dooren was a director of that company. It was, however, found that no part of the benefit obtained by the purchasers reached the defendants.

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[1] Landlord and Tenant (Rent Control) Act, 1949, s. 2: " (1) A person " shall not, as a condition of the " grant, renewal or continuance of " a tenancy to which this section " applies, require the payment of any " premium in addition to the rent. " (2) Subject to the provisions of Part " II of the First Schedule to this Act, " a person shall not, as a condition " of the assignment of a tenancy to " which this section applies, require " the payment of any premium. . . . " (5) Where, under an agreement " made after March 25, 1949, any " premium has been paid which, or " the whole of which, could not lawfully be required under the foregoing " provisions of this section (or, if the " premium was required before the " commencement of this Act, which " could not lawfully have been required " if this Act had then been in force), " the amount of the premium, or so " much thereof as could not lawfully " be required or have been required, " as the case may be, shall be recoverable by the person by whom it was " paid. . . . (6) A person requiring any " premium in contravention of this " section shall be liable on summary " conviction to a fine not exceeding " £100, and the court by which he is " convicted may order the amount of " the premium, or so much thereof as " cannot lawfully be required under " this section, to be repaid to the person by whom it was paid." Subs. (7) repeals s. 8 of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, subject to a qualification. " (8) For the avoidance of doubt it is " hereby declared that nothing in this " section shall render any amount " recoverable more than once."

The following statement of the material findings was cited from the judgment of the county court judge by Lord Evershed M.R.: "At the relevant time the plaintiff and his wife were "joint owners of 174, The Heights, South Harrow (hereinafter "called '174'), where they lived. The house was subject to a "mortgage, payments under the mortgage deed were in arrear "and the plaintiff and his wife decided that the only way out "was for them to sell 174, repay the mortgage money out of the "price obtained, and obtain a flat. They had nowhere to go, "they were compelled to leave their own house. . . . During "their quest for a flat they passed the window of Clifford & "Clifford Ltd. (hereinafter called Clifford), who were estate "agents, and they saw advertised in the window a self-contained "flat to let unfurnished. They went in and asked if the flat was "available and if they could see it. Clifford's representative, a "Mr. Williamson, replied to their question with 'Have you got "'a house to sell?' They said 'Yes' and Williamson then said "that he would take them over the flat, 108, Welldon Crescent. "They went to see it and liked it. It was conceded on behalf "of the defendants that the tenancy offered and subsequently "granted was one to which the Rent Restriction Acts and in "particular the Act of 1949 applied. Williamson then made it "plain to the plaintiff and his wife that they could not have the "tenancy of the flat unless they were prepared to sell 174 at "£500 less than its fair market value. I was satisfied that the "fair market value of that house was at the time between "£2,300 and £2,400 and that Clifford knew this very well and "on behalf of the defendants required the plaintiff and his wife "to sell it to purchasers who turned out to be Pegasus Training "Estates Ltd. (hereafter called 'Pegasus') at £500 less than "its value. The plaintiff and his wife thought it over and, as "they had nowhere else to go, they felt they had no alternative "but to agree. They accordingly sold 174 to Pegasus for £1,800 "and received in return from the defendants a tenancy of "108, Welldon Crescent at a weekly rent of £1 15s. 0d. I hold "that the sale by the plaintiff and his wife to Pegasus of 174 "at an undervalue amounting to £500 was required by Clifford "acting for the defendants as a condition of the tenancy being "granted by the defendants to the plaintiff."

The judge, however, held that he was bound by *Rex* v. *Birmingham (West) Rent Tribunal; Ex parte Edgbaston Investment Trust Ltd.*[2] to decide in favour of the landlords. The plaintiff appealed.

H. Heathcote-Williams Q.C. and *Henry Palmer* for the plaintiff. It is not necessary for the purposes of section 2 of the Act of 1949 to show that the person requiring an illegal premium also received it, but it is submitted that the judge should have found that there was in fact a payment to the defendants, because payment made at the direction of the landlord is payment to him.

Alternatively, if the payment was not to the defendants but to Pegasus only, the judge was wrong in law in holding that the defendants did not "require" an illegal "premium," when they required the plaintiff to sell at an undervaluation to a third party.

The finding that the defendants took no benefit except that they let their flat is against the weight of the evidence. They had the benefit of being able to direct the disposal of the £500.

"Payment" includes getting a pecuniary benefit. There is nothing in section 2 (1) about the recipient of the payment; the mischief aimed at by the section is "requiring" a premium. There was an agreement here within subsection (5), that is, that a tenancy would not be granted unless pecuniary consideration of £500 was paid. Until 1920 a premium was recoverable from "the landlord," but in the Act of 1949, if the payment is made under an agreement, the destination is apparently immaterial.

Cantor v. *Pacey*[3] is not helpful. *Rex* v. *Birmingham (West) Rent Tribunal; Ex parte Edgbaston Investment Trust Ltd.*[4] is distinguishable, because in that case there was consideration. The tenant was taking a tenancy of something which was not then a flat, and he was paying to have the premises altered. Lord Goddard C.J.'s remark that the Act "can only apply to premiums "which are paid to the landlord" was obiter, because the payment in that case was not a premium at all. The Court of Appeal is not in any event bound by that case.

"Premium" must be wider in scope than a pecuniary consideration paid to the landlord personally. The prohibition against premiums paid on an assignment was introduced in 1949 and such "premiums" would plainly not be paid to the landlord.

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[2] [1951] 2 K.B. 54; [1951] 1 T.L.R. 77; [1951] 1 All E.R. 198.

[3] (1949) 153 E.G. 163; 99 L.J. News. 105.

[4] [1951] 2 K.B. 54.

The facts of this case fit without difficulty into the scheme provided by the statutory provisions. By selling at the undervaluation, the plaintiff was discharging the liability imposed by the agreement which he had made with the landlord. In deciding whether a payment is a "premium," the nature of the payment should be considered from the point of view of the tenant who has made the payment, and from that standpoint the relationship between the payee and the defendants is immaterial.

It is essential that the landlord should "require" the premium (*Remmington* v. *Larchin*[5]), but it is not disputed that the estate agents were acting on behalf of the landlords.

In the *Birmingham* case[6] Lord Goddard C.J. placed reliance on *King* v. *Cadogan* (*Earl*),[7] but the subject-matter of that case was far removed from this. There are helpful comments by all the Lords Justices in the Court of Appeal in *Camden* (*Marquis*) v. *Inland Revenue Commissioners*.[8]

[LORD EVERSHED M.R. That case was concerned with a different Act.]

King v. *Cadogan* (*Earl*)[9] was considered in *Woods* v. *Wise*,[10] and it was pointed out that although the words used by the Lords Justices were very wide, the language used had to be read against the background of the Finance Act, 1912. Romer L.J.[11] pointed out that the emphasis is on the "requiring" of the premium and not on "receiving." That observation is of great persuasive authority.

There is nothing unfair in providing that the person requiring the premium should have to repay it even if the payment was made to a third party. Section 2 (8) would be otiose unless there may be circumstances in which more than one person might be liable to repay a premium, but it is unnecessary in this case to establish that the plaintiff could recover the premium from Pegasus. The Act is concerned with the person who requires a premium, and he must repay it. The transitional provisions in the First Schedule deal specifically with the person to whom a premium has been paid.

[5] [1921] 3 K.B. 404.

[6] [1951] 2 K.B. 54.

[7] [1915] 1 K.B. 821; [1915] 3 K.B. 485.

[8] [1914] 1 K.B. 641; (affirmed [1915] A.C. 241, sub nom. *Inland Revenue Commissioners* v. *Camden* (*Marquis*)).

[9] [1915] 3 K.B. 485.

[10] [1955] 2 Q.B. 29; [1955] 2 W.L.R. 734; [1955] 1 All E.R. 767.

[11] [1955] 2 Q.B. 29, 57.

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The plaintiff is entitled to recover the whole sum paid jointly by him and his wife. The agreement was that he would not get a tenancy unless he procured a pecuniary consideration of £500, but what happened between him and his wife does not concern the defendants.

[Reference was also made to *Minns* v. *Moore* [12] and *Temple* v. *Lewis*.[13]]

Henry Palmer following. A payment of a premium could be to the landlord or to his agent or to a third party. It could be in discharge of an obligation or for some other reason, but there is no burden on the tenant to find out what is the position between the landlord and the third party. Pegasus have received the sum as the person nominated by the landlord. If payment was made in the manner provided by the requiror, then that is equivalent to payment to the person requiring the premium. In the *Birmingham* case [14] the conversion of the house was in the future—the builder gave consideration for the money received from the prospective tenant, and the agreement between the builder and the prospective tenant was not dependent on the agreement with the landlord.

There is a dearth of authority where the plaintiff has sought to recover from a third party. [Reference was made to Halsbury's Laws of England, 3rd ed., vol. 8, p. 210.] It is still open for consideration whether Pegasus were in fact acting as agents for the landlord.

Conrad Dehn for the defendants. It is conceded, first, that section 2 of the Act of 1949 applies to this tenancy. Second, that whatever was required was required as the condition of the grant of the tenancy. Third, whatever was required was required by the defendants through their agents.

It is submitted, first, that no payment of any kind was required or made; second, that if anything was paid, it was not a premium within the meaning of section 2 (1) of the Act of 1949. That subsection relates to a money payment, and a money payment which is made to the landlord. "Premium" should be construed narrowly, for requiring a premium is a criminal offence, and a penal provision should be construed leniently. [Reference was made to *Minns* v. *Moore*,[15] *Remmington* v. *Larchin* [16] and

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[12] [1950] 1 K.B. 241; 65 T.L.R. 739; [1949] 2 All E.R. 800.

[13] [1954] 1 Q.B. 22; [1953] 3 W.L.R. 762; [1953] 2 All E.R. 1130.

[14] [1951] 2 K.B. 54.

[15] [1950] 1 K.B. 241.

[16] [1921] 3 K.B. 404.

Megarry on The Rent Acts, 8th ed., p. 401, last para.] Where a penal section has been generally understood in a certain sense, the court will hesitate to construe it differently unless forced to do so by the language. *Silverman* v. *Green*[17] was a stronger case than this, but the judge held that the £150 was not pecuniary consideration. On the ordinary use of language the plaintiff has not paid anything in this case. He sold his house for £1,800. It cannot be said that someone who sells at an undervalue and receives money is making a payment of money, though it is not disputed that payment can be by a set-off. If this transaction had consisted, first, of a sale to the defendants for £2,300, and then £500 had been paid for the tenancy, there would have been a "premium" of £500. But in this case there was only one transaction and one agreement and it cannot be split into separate parts. It is conceded that "consideration" in section 18 (2) of the Act of 1949 bears its ordinary meaning, but it must be pecuniary consideration.

[LORD EVERSHED M.R. The agent was acting in a dual capacity for the defendants and also for Pegasus. The £500 was in fact an actual pecuniary detriment and Pegasus were going to have the benefit then and there.]

So far as the plaintiff was concerned, there was only the one transaction. He had no contract to sell at £2,300 which he was abandoning. He was merely selling at £500 below the market value. Presumably it would not have been contended that if he had been required to sell the house at the full value as a condition of the grant, that was a premium. The value of the house might have been uncertain. It cannot make any difference if the price put on the house turns out to be less than the market price. There are all sorts of difficulties if one strays from the relatively easily understood concept of a payment in money. The prohibition against "giving" consideration in section 8 (1) of the Act of 1920 was dropped in the Act of 1949 in circumstances where the exact wording must have been well in the mind of the legislature.

[LORD EVERSHED M.R. It would be strange if this Act provided a means of getting premiums which had been prohibited before.]

The earlier wording would have led to difficulty in applying the First Schedule to the Act of 1949 where the rent tribunal was empowered to work out the rental equivalent. The omission makes the language more precise. The giving of credit might

[17] C.P.L. 1953, 508.

have been caught, but section 14 of the Rent Act, 1957, expressly provides that demanding a loan is a "premium"—which shows that it was not so regarded under the earlier legislation.

[LORD EVERSHED M.R. "Premium" as defined must be something expressed in terms of money.]

If that were so, the vital point would be whether the undervalue had been stated in terms or not, and that cannot be right. In *Inland Revenue Commissioners* v. *St. John's College, Oxford*,[18] Rowlatt J. held that the surrender of a lease was not a payment; and see also *King* v. *Cadogan (Earl)*.[19] *Morgan* v. *Couchman*[20] shows that strictly "payment" means payment in money, but the parties may waive their rights and agree to a wider construction. That would not, however, affect the construction of the definition.

There was never any demand for a premium. The £500 was specifically related only to the sale of the house by the plaintiff. There is no evidence that the landlord treated the £500 as a payment. *Henderson* v. *Arthur*[21] shows that payment should be construed strictly as referring to cash, unless the landlord has agreed to accept something else in lieu, as, for example, a cheque. Payment by cheque would, however, be within the statutory prohibition as "other pecuniary consideration."

If anything has been paid, it was not a "premium." "Other "pecuniary consideration" in section 18 (2) must be construed ejusdem generis with "fine or . . . like sum." [Reference was made to *Utting & Co. Ltd.* v. *Hughes*.[22]] A "fine" is the price exacted by a landlord for allowing an assignment, but it is, practically speaking, synonymous with a premium. It must be a money payment: *In re Cosh's Contract*.[23]

Parliament may have thought that the present type of case was so improbable that it was not dealt with at all. The language used does not cover payments in kind. The Act does not prohibit the exaction of "money's worth": *Attorney-General* v. *Wolverton*.[24] The payment must be "in addition to the rent," which suggests that the consideration has actually to be paid or delivered to the landlord. [Reference was also made to *Crespigny* v. *Wittenoom*[25] and *Hutton* v. *Lewis*.[26]] In *Blake* v. *Attersoll*[27] the relinquishment of a money claim of doubtful value to an

[18] [1915] 2 K.B. 621.
[19] [1915] 3 K.B. 485.
[20] (1853) 14 C.B. 100.
[21] [1907] 1 K.B. 10.
[22] [1939] 2 K.B. 231.
[23] [1897] 1 Ch. 9.
[24] (1896) 65 L.J.Q.B. 610.
[25] (1792) 4 T.R. 790.
[26] (1794) 5 T.R. 639.
[27] (1824) 2 B. & C. 875.

estate was held not to be pecuniary consideration, and in the *Birmingham* case [28] doing work was not pecuniary consideration. Section 2 of the Act of 1949 stresses that what Parliament was concerned with was payment, and the language is inapt to the giving or selling of goods or property at an undervalue whether the extent of the undervaluation is specified or not. If the plaintiff's submission on this point is right section 3 would be otiose.

The further question is whether to be a "premium" within section 2 (1) of the Act of 1949 the payment must be made to the landlord. The expression must bear the same meaning throughout the section, and it is submitted that it means a payment to the requiror. The prohibition was intended to prevent landlords from exploiting the housing shortage for their own benefit. If a landlord, for example, required payment to be made to a charity, it is not clear that that would be within the mischief. It is not suggested that payment to a landlord's nominee necessarily escapes the prohibition. It all depends on the terms on which the nominee receives the payment. Strictly, the onus of proving that the landlord has in reality received the payment would be on the tenant, but an inference may be drawn where a payment is made to an agent acting on behalf of the landlord. In the present case the judge found that the landlord did not benefit.

[ORMEROD L.J. It may be said that common sense indicates that the defendants must have got some benefit. It must have been to their interest that Pegasus should have the benefit of the transaction.]

[LORD EVERSHED M.R. Otherwise the agents would have been acting outside the scope of their authority in making a present of £500 to Pegasus.]

In the *Birmingham* case [29] the payment was at the request of the landlord, though not for his benefit. The reasoning that the Act was only intended to apply where payment was made to the landlord was an alternative ground for the decision reached and was not obiter. The question whether the third party gave consideration for the payment was irrelevant on the issue whether the payment was to the landlord, but it was relevant on the alternative reasoning for Lord Goddard C.J.'s judgment. In this case the third party gave consideration. They paid £1,800 and the adequacy of the consideration is not a matter for investigation. The present transaction was effected one year after the *Birmingham* case, and on the earlier Act the same view had been taken:

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[28] [1951] 2 K.B. 54.

[29] [1951] 2 K.B. 54.

see *Remmington* v. *Larchin*[30]; *King* v. *Cadogan* (*Earl*)[31]; *In re Cosh's Contract*[32] and *Camden* (*Marquis*) v. *Inland Revenue Commissioners*.[33] [Reference was also made to Woodfall on Landlord and Tenant, 2nd Permanent Supplement, The Rent Acts, Pt. II, 1958, p. 145, para. 120, and Megarry on the Rent Acts, 8th ed., p. 405.]

If a premium need not be paid to the landlord or requiror, logically it is not necessary that it should be recoverable only from him. It would seem that it would only be recoverable from the person who had received it. If that were right, an innocent recipient would have to repay a premium he had received, and by virtue of section 2 (6) of the Act a person who had not received it could be ordered to repay it. This reinforces the argument that Parliament must have intended that the prohibition should only touch a sum received by the landlord or requiror.

The Act provides by section 2 (5) that the premium is recoverable only by the person by whom it is paid. The payer need not be the prospective tenant: *Temple* v. *Lewis*.[34] To recover the whole amount the wife ought, therefore, to have sued as a plaintiff with her husband. [Reference was made to *Steeds* v. *Steeds*.[35]] As this was a fictional and not a real payment, it is difficult to say who paid it. The husband and wife were joint tenants of the legal estate, but beneficially they held in equal shares limited to £250 each, so that payment would not be £500 from both acting together. If the husband got judgment for £500 his wife could have brought another action and claimed a further £250.

[LORD EVERSHED M.R. On a sale the purchase price would have been payable to them jointly and, therefore, it may be that this sum has to be treated as having been paid by them jointly—which would be consistent with the view that if they had had all the money it would have been divisible between them in equal shares in equity.]

[WILLMER L.J. It could be said that they had only a joint fund of £2,300, out of which they could jointly contribute £500.]

If it is said that they "paid" anything, then one must assume a notional payment to them of the purchase price, which was then notionally divided. Then they notionally made a repayment of £250 each.

Heathcote-Williams Q.C. in reply. The person who was really making the bargain was the husband, and he was getting the tenancy. The wife cannot be joined as a plaintiff now. The point was not adequately pleaded that if a premium was paid it was only paid as to half by the plaintiff.

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[30] [1921] 3 K.B. 404, 411.
[31] [1915] 3 K.B. 485.
[32] [1897] 1 Ch. 9.
[33] [1914] 1 K.B. 641.
[34] [1954] 1 Q.B. 22.
[35] (1889) 22 Q.B.D. 537.

The cases cited do not really help in deciding the issue in this case. They were dealing with a different conception.

"Any other pecuniary consideration" in section 18 (2) should not be construed ejusdem generis with the preceding words. Giving and paying consideration are synonymous. The absence of "giving" in the current statutory provision is not therefore significant.

Cur. adv. vult.

April 28. The following judgments were delivered.

LORD EVERSHED M.R. The question is whether, if a proposing landlord, as a condition of the grant of a tenancy by him, requires the proposing tenant to sell his own—that is, the tenant's—property at a stated amount of undervalue, not to the landlord himself but (the landlord being a limited company) at the landlord's demand to another company closely associated with the landlord, that amounts to requiring the payment of a premium within the terms of section 2 of the Landlord and Tenant (Rent Control) Act, 1949: and further, if it does, whether the tenant, who paid it, can now recover the premium from the landlord who required it.

The transaction which we have to consider, it must be confessed, is not an attractive one, and might well (as the judge thought) be said to be within the mischief aimed at by the Act; but the question is whether it is within the Act's language.

[His Lordship stated the facts and continued:] It is quite clear that the value of the house, at the interview which the plaintiff and his wife had with the representative of Clifford & Clifford Ltd., was stated and assumed and accepted as being £2,300; so that if the condition were complied with it meant that the sale price would be £1,800—as was later the fact. It is also clear that the plaintiff and his wife were joint owners; though it appeared from certain questions which were, quite properly, put in cross-examination to the plaintiff, that he (at any rate) regarded the interests of himself and his wife in equity as being equal; so that the plaintiff, in answer to a specific question put by Mr. Dehn, said that if they had received the full value, £2,300, "there would have been £250 for himself and £250 for his wife."

The judge, in a very full and clear judgment, would have concluded, on the facts which he had found, in favour of the plaintiff but for a decision in *Rex* v. *Birmingham (West) Rent Tribunal; Ex parte Edgbaston Investment Trust Ltd.*[1] in 1951, to which I shall later refer: but he felt bound by that decision to hold that the transaction was one outside the scope of the Act of 1949.

Mr. Dehn, for the defendants in this court, has conceded—in accordance with the findings of the judgment—first, that the tenancy of 108, Welldon Crescent with which we are concerned was within the ambit of the Rent Acts: second, that what Williamson required, at the interview described by the judge, was in truth a condition of the grant of the tenancy; and third, that the requirement made by Clifford's was made by them as agents for the defendant company.

In those circumstances, the two principal questions presented to us are as follows. Question (1): Is the allowance (and I again take a neutral term) which was required at this interview and which was accepted, a payment of a premium within the relevant sections of the Rent Act? It is the argument of Mr. Dehn that it is neither the one nor the other—that is, neither a payment nor a premium. Question (2) (if the answer to the first is affirmative): Is the premium, £500, recoverable now from the landlord who required it, although he did not receive it or any part of it? If both these questions should be answered in favour of the plaintiff there arises a third question: Having regard to the particular beneficial interests of the plaintiff and his wife, according to the plaintiff's evidence, is he entitled to recover the full amount of £500 or is he limited to half that figure, £250?

At this stage I must refer to the relevant parts of the Landlord and Tenant (Rent Control) Act, 1949, of which the vital section is section 2, which provides: "(1) A person shall not, as "a condition of the grant, renewal or continuance of a tenancy "to which this section applies, require the payment of any "premium in addition to the rent. (2) Subject to the provisions "of Part II of the First Schedule to this Act, a person shall not, "as a condition of the assignment of a tenancy to which this "section applies, require the payment of any premium." I need not refer to subsection (3)—nor indeed to subsection (4), though Mr. Dehn did draw attention to it. Subsection (5) provides: "Where, under an agreement made after March 25, 1949, any

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[1] [1951] 2 K.B. 54; [1951] 1 T.L.R. 77; [1951] 1 All E.R. 198.

"premium has been paid which, or the whole of which, could "not lawfully be required under the foregoing provisions of this "section . . . the amount of the premium, or so much thereof "as could not lawfully be required or have been required, as the "case may be, shall be recoverable by the person by whom it "was paid." There is then a proviso relating to cases which have arisen or might have arisen under earlier legislation. Subsection (6): "A person requiring any premium in contravention "of this section shall be liable on summary conviction to a fine "not exceeding £100, and the court by which he is convicted "may order the amount of the premium, or so much thereof as "cannot lawfully be required under this section, to be repaid to "the person by whom it was paid." Then by subsection (7) there is a repeal (subject to a qualification) of section 8 of the Act of 1920; and finally, in subsection (8): "For the avoidance "of doubt it is hereby declared that nothing in this section shall "render any amount recoverable more than once."

The word "premium" is in this Act extended, by way of definition, in section 18 (2) as follows: "The expression "'premium' includes any fine or other like sum and any other "pecuniary consideration in addition to rent." There is a First Schedule, headed "Transitional provisions as to premiums," Part I of which deals with adjustments for premiums paid before the commencement of this Act; and it is sufficient, I think, to state that the sense of this part of the Schedule is that such a premium may be converted, by the necessary arithmetical calculation, into a rent, for certain purposes which then follow. The point of my having stated it in that form is that, as Mr. Dehn quite rightly pointed out, it is at least clear that the First Schedule, Part I, does require that the relevant so-called "premium," if it is to be capable of arithmetical calculation, must at least be expressed as a money sum in one form or another.

It is necessary that I should also refer back to the previous legislation upon this matter; and before doing so I draw attention to the long title of the Act of 1949. So far as relevant, it provides thus: "An Act . . . further to restrict the requiring of premiums "in connection with tenancies to which those Acts"—that is, the earlier legislation—"apply." I go back to the fons et origo of these "premium" provisions, which is found in the Increase of Rent and Mortgage Interest (War Restrictions) Act, 1915, section 1 (2) of which states: "A person shall not in considera-"tion of the grant" (etc.) "of a tenancy of any dwelling-house

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"to which this Act applies require the payment of any fine, "premium, or other like sum in addition to the rent, and where "any such payment has been made in respect of any such "dwelling-house after" (a stated date) "then the amount shall "be recoverable by the tenant by whom it was made from the "landlord. . . ."

I observe that in that subsection the definition of "premium" now found in section 18 of the Act of 1949 is somewhat curtailed; for it refers only to "the payment of any "fine, premium, or other like sum": there is no reference to "any other pecuniary consideration." It will also be noted that by the express terms of section 1 (2) the amount recoverable is stated to be recoverable "from the landlord."

In the year 1920 that section was replaced by section 8 of the Act of 1920—which, it will be recalled, is referred to in section 2 (7) of the Act of 1949. As re-stated in section 8 (1), the prohibition about premiums runs as follows: "A person shall not, "as a condition of the grant . . . of a tenancy or subtenancy of "any dwelling-house . . . require the payment of any fine, "premium, or other like sum, or the giving of any pecuniary "consideration, in addition to the rent, and, where any such "payment . . . has been made or given . . . the amount or "value thereof shall be recoverable by the person by whom it "was made or given." It will be observed that in this section there is added to the prohibited subject-matter (if I may so describe it) the giving of any pecuniary consideration. On the other hand, the words "from the landlord," which were found in section 1 of the Act of 1915, defining the person from whom the premium could be recovered, are omitted.

In the Act of 1949 the prohibition, or series of prohibitions, in section 2 is shorter. All you find is "payment of any "premium"; and then the scope and extent of the prohibition is shown by the expanded use of the word "premium," as stated in section 18 (2), so as to include "any fine or other like sum "and any other pecuniary consideration in addition to rent." It was Mr. Dehn's argument that under the Act as it now stands, and according to a proper construction of the English words used, the "payment" which is prohibited is limited to a cash sum, or at any rate to its strict equivalent—for example, perhaps payment by cheque in the ordinary way, or perhaps also a set-off in account against another sum expressed in money. And it is further his contention that the "premium," even as expanded in the definition, is limited to something payable to and received by the landlord.

Mr. Dehn cited to us a great number of cases. I certainly make no complaint of that fact: indeed, I think it right that I should record my own admiration for the great skill and industry that Mr. Dehn devoted to his presentation of this case. But having considered all these cases, I am bound to say that I do not think that they provide any assistance in solving our problem; though I am grateful for having had the opportunity of seeing them. Thus, I do not myself think it helpful, in the context of this legislation, to consider relatively old cases relating to the use of the word "premium," unexpanded by any definition, in its old strict conveyancing sense, or as used in certain taxing statutes. We were referred, for example, to statutes of the reign of King George III intended to prohibit or limit the sale of life annuities; and, as I have said, though we have examined these cases I cannot think they really assist in construing the provisions of this modern legislation—though there are some later, modern cases, to two of which at any rate I shall refer. Here, however, we are concerned with the effect, first, of this definition in section 18 (2). It was Mr. Dehn's submission that "other pecuniary consideration" must be construed ejusdem generis with "fines" and "premiums"—which (for reasons already indicated) he sought to confine to the kind of usage in which those words are found in connection with older conveyancing language where the "fine" or "premium" is in effect equivalent to, or in substitution for, a part of the rent and intended to reduce the annual amount payable by way of rent accordingly. I do not think that "other pecuniary consideration" ought to be, or can properly be, so limited. After all, the words in the definition are "any other pecuniary consideration"—which means, presumably, according to the ordinary sense, any pecuniary consideration other than (inter alia) fines or other like sums—that is, other sums like fines. It seems to me, therefore, that the phrase "any other pecuniary consideration" (though I am not suggesting it covers other than pecuniary considerations) is a formula of fairly wide import. It is quite true that (as I have pointed out) the word "giving," which was found, in relation to pecuniary consideration, in section 8 of the Act of 1920, is not found in this section. I am not saying that Mr. Dehn would go so far as to concede, if it were found that the word "giving" were somewhere included in these statutory provisions, that on this part of the case he was thereby defeated. But I think he was prepared to say that the case against him would be stronger had the word "giving" been repeated in this Act. But, in all the circumstances, I do not think that the absence of the word "giving" is significant. As I have pointed out, the purpose of this Act, according to its long title—and it is manifest in many other ways—is further to restrict the taking of premiums. It is quite true that it brings in (and brings in, I think I am right in saying, for the first time) the exaction of a premium not only on the grant or renewal of a tenancy but also on an assignment—a point which is of significance on another aspect of the case. But none the less it would, as I think, be a very surprising thing, in the face of this Act and its long title, if you could take it that the effect was to render permissible types of so-called "premiums," types of "pecuniary consideration" exacted, which had been prohibited by earlier legislation. I think that what Parliament has done has been, for the purpose of abbreviating the operative section, to put in a form of definition of the word "premium" but not thereby to limit the enacting part to a scope narrower than under the earlier legislation.

I, therefore, conclude that, where a specific sum is to be deducted from a known or assumed sale price as a condition of the grant of a tenancy, that is a "pecuniary consideration" within the scope of the definition, and amounts, therefore, to a premium. If I am right it must follow that the exaction of such a deduction must amount to a "payment"; and I find, indeed, no difficulty in so concluding: for the word "payment" in itself is one which, in an appropriate context, may cover many ways of discharging obligations. It may even (as is well known, though it does not arise in this case) include a discharge not by money payment at all but by what is called "payment in kind." It follows, therefore, that if, in the present case, the defendants had required, as a condition of the grant of a tenancy, that the plaintiff should sell to the defendants his own house, 174, The Heights, for £500 less than the known or assumed value of £2,300, that would have been the requiring of the payment of a premium, within the scope of the section.

But there arises the second part of the question—already adumbrated—on which, I confess, I have found more difficulty: Is the "payment" contemplated by the section confined to one made to the landlord?—and it is upon this question that *Rex* v.

Birmingham (*West*) *Rent Tribunal*[2] ex facie is in support of Mr. Dehn's argument and is such as to have compelled the judge to have decided this case as he did. It is, perhaps, an odd feature of this Act that nowhere in terms does it state to whom the required payment is to be made. Originally (it will be recalled) section 1 (2) of the Act of 1915 in terms was so expressed as to be limited to the case of a payment to the landlord. But the reference to the landlord was dropped in 1920; and it was pointed out in one of the cases to which I shall later come (*Remmington* v. *Larchin*[3]) that one possible reason for that was that the Act of 1920 comprehended the requirement of a premium upon the grant not only of a tenancy but also of a subtenancy. But, of course, if that is so then it does seem to follow that the dropping of the reference to the landlord was deliberate: in other words, that the intention of the amending legislation was not confined to payment to the landlord. It is quite true that, on this view, one might well have expected Parliament to have substituted for the phrase " the landlord " some words like " the person who received it." That they have not done. Nevertheless I think myself (if I am free to do so) that the dropping, in the Act of 1920, of the words " to the " landlord " was significant. A contrary view (as is quite plain) would very gravely limit the effectiveness of the legislation.

There is no doubt—and Mr. Dehn, of course, conceded—that payment to a mere nominee, a mere alter ego of the landlord, would be payment " to the landlord "; and if one pays a debt of the landlord's which he owes to some third party the same might equally be true. But even in the case where the payee was a pure nominee or alter ego it would by no means be easy in every case for a tenant so to prove. If the object of the legislation was, and is, to prevent tenants being charged excessive rents because of the economic pressure of a housing shortage, and if it was to achieve, or to assist in achieving, that end that it was made unlawful to charge a premium in addition to the rent, then why, as a matter of logic, should a premium paid to the landlord, direct or to his mere nominee, be unlawful, and one paid, to the landlord's order, to some other person whom the landlord nominated—say to a friend, to his son, to a trustee, or (as here) to an associated company—be lawful? If Mr. Dehn is right, this further must be added, that some words ought to be written in: you would have, in other words, to write into the legislation the words "to the landlord" in a case like this, or (having regard to subsection (2)) "to the person requiring the payment." Those words are not in fact there; and by well-established principles of construction words should not be written into an Act of Parliament unless the sense of the Act plainly requires that to be done.

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[2] [1951] 2 K.B. 54.

[3] [1921] 3 K.B. 404.

Mr. Dehn further, and most naturally and properly, relied on other language in the section. For example, he referred to the phrase on which I have laid emphasis in reading the section, in section 2 (1), "in addition to the rent." He referred to the word "recoverable" in subsection (5). He referred (and this is perhaps stronger still) to the word "*re*paid" in subsection (6), where the court before whom a landlord may appear for making an unlawful charge may order that the premium be "repaid to "the person" who paid it.

Apart, however, from *Rex* v. *Birmingham (West) Rent Tribunal; Ex parte Edgbaston Investment Trust Ltd.*,[4] I am satisfied, and treating this matter as res integra would conclude, that these considerations, to which I have alluded and which Mr. Dehn much pressed upon us in argument, are not sufficient to limit the cases under the Act to those in which the payment has been made to the person "requiring." No doubt that sort of case, if you look at the history of the legislation, is the one which would most commonly spring to the mind; but the words "in addition to the rent" I think only tend to show that this is something which is not the rent capitalised (as did occur in one of the cases which came before the court); nor indeed is it necessary after all (though it would normally be the case) that the rent should be paid to the landlord. Again, the word "recoverable," I think, in this context, only means that the premium, the sum paid, would be the proper subject of a claim which these courts would recognise. And finally, the word "repaid" in the relevant phrase in subsection (6) is, I think, used only in relation to the person who paid it, making the point that that person may get back what he himself paid. It remains equivocal from whom he may be able to get it back.

Rex v. *Birmingham (West) Rent Tribunal, Ex parte Edgbaston Investment Trust Ltd.*[4] came before the Divisional Court on an application for an order of certiorari. The case was a somewhat exceptional one on its facts. The tenant was anxious to get a flat in a building which at the time the agreement was entered into did not contain or consist of flats; and the agreement that was made was of a tripartite nature, the parties to it being the owners of the premises, called the landlords, who were going to let to the tenant a flat when the flat had come into existence; the builders, who were going to do the conversion and were going to create the subject-matter on which alone the tenancy agreement could operate; and the tenant himself. Thus, you find that the agreement first of all sets out that the landlords and the tenant agree with the builders that the builders will do the necessary conversion of these dwelling-houses into a block of large flats, to the satisfaction of the named surveyor of the landlords, for a sum of money of which the landlords are going to pay half and the tenants between them are going to pay half. Next, the builders agreed that they would do that work and would look to the landlords for half the £18,000 and to the tenants, in the proportions later stated, for the remaining £9,000. Then in the third clause of the agreement it is provided that if the building and works should be completely finished to the satisfaction of the surveyor, the landlords will grant and each of the tenants will accept and execute a good and sufficient lease of one of the flats for a term from a certain date there mentioned, at a yearly rent, there being no further reference to the amount paid to the builders—which, ex hypothesi, when the agreement for a lease came to be executed, would have been already discharged. In those circumstances, however, the rent tribunal had decided that the sum which a given tenant had paid as his proportion of the builders' charges for doing the conversion was a premium. On the facts of that case, the Divisional Court held that it was not a premium; and, if I may respectfully say so, I think that was a correct decision, because it seems to me that it could not be said, with any fair use of language, that the payment of this sum to the builders was a requirement or condition of the grant of the tenancy, as the Act contemplates. There was a bargain made that, first of all, a subject-matter had to be created: the proposing landlords and the proposing tenant agreed that they would bear in certain proportions the cost of creating the subject-matter: and when that had been done to the satisfaction of the surveyor then there was an agreement that a tenancy would be granted.

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[4] [1951] 2 K.B. 54.

Thus, it was concluded that the case was in truth outside the scope of the Act of 1949. But there is no doubt that, in the course of his judgment, Lord Goddard C.J. used language which went (as I think) further than was necessary to dispose of the case on the lines which I have indicated. Thus, at the beginning of his judgment, Lord Goddard C.J. is reported as saying[5]: "The "whole question here depends on whether or not the Act of "1949 on its true construction has any application to the case "where a sum of money is paid not to the landlord but to some "other person"; and, later, ". . . in our opinion this Act can "only apply to premiums which are paid to the landlord." He then deals with the substance of the case, and I will read it because it seems to me (if I may say so) that here should be found the true basis of the decision. He says[6]: "In the present "case the terms of the main agreement of July 31, 1948, make "it clear that the builders, who were a party to the agreement, "and willing to enter into the speculation or enterprise, were "willing to convert the premises for the sum of £18,000 and only "to look to the landlords for half that sum. It is abundantly "clear from the agreement that the builders could never have "sued the landlords for anything more than £9,000. If they "were to obtain more, tenants had to be found. Then each "tenant had to agree to pay them £500, or he would not be "granted a lease; but he had to pay that money not to the land-"lords but to the builders. The landlords never had any claim "against the tenant for the £500, although they would probably "not have granted the lease to anybody who had not agreed to "sign the main agreement. The builders could only recover the "balance of the £9,000 from the various tenants up to £500 each. "The payments made by the tenants were made before the Act "came into force. Supposing that this had been a case after "the Act came into force, from whom could the tenants have "recovered the money if they had paid it? They could not "have recovered it from the builders because the consideration "which supported the payments was not the grant of the lease" —and note those words—"but the work which the builders did "in converting the premises. They could not have recovered it, "as it seems to me, from the landlords, for the landlords had not "received the money." Then, later, and this was the passage quoted by the judge which he felt particularly pressing upon him: "In the present case I prefer to base my judgment on the "proposition that, on its true construction, this Act was intended "to apply only to a pecuniary consideration paid to the landlord."

It is quite plain (if I may respectfully say so) that that statement, on the face of it, cannot be right. No reference had been made in the argument, so far as I can see, to subsection (2) of section 2 of the Act of 1949, which deals with the case of the demand of a premium as a condition of an assignment. In that case it would be difficult to suppose that the only person of whom it was intended to say "he received an unlawful premium" would be, not the assignor, but the landlord. To that extent, in my judgment, therefore, the view of the Divisional Court must require qualification. But, apart from that matter, I have concluded that the language in the *Birmingham* case [7] went further than was necessary or justifiable. The true view of the case, I think, is that it was not one of a demand, as a condition of a lease, of the payment of a particular sum at all: it was a case of a quite distinct commercial arrangement, outside the scope of the Act. If, therefore, Lord Goddard C.J. meant by his language that the Act was intended to apply only to a payment to the landlord as distinct from a payment to the landlord's order—and I am not sure that he did, for the limitation was unnecessary to his reasoning—I am unable, with all respect, to agree with him. I cannot agree that this Act should be construed as though the words—not, "to the landlord," but "to the person requiring "the payment"—had been (as they are not) inserted in the relevant section.

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[5] [1951] 2 K.B. 54, 56.

[6] Ibid. 57.

That, however, is still not the end of it, because (and this argument was much pressed upon us by Mr. Dehn, and has indeed caused me some anxiety) it is no doubt true that the view apparently expressed by the Divisional Court in the *Birmingham* case [7] in 1951 may well have been acted on in other cases since. Other landlords may have said, upon that authority, "It is all "right so long as I tell the tenant not to pay me but to pay my "friend, or my son, or some other person whom I nominate"; and it is after all true that the unlawful demanding of a premium does amount, on the part of the landlord, to a criminal offence.

Such considerations were expressed in an earlier case, in 1921, of *Remmington* v. *Larchin*.[8] That again (as is true of so many of these cases) was a case of a somewhat special character on its facts. There a tenant with a short term left of his lease to run—they were rent-restricted premises—said to another: "If "you will pay me £x I will surrender my lease and get the land-"lord to grant you a new one at the protected rent"; and that bargain was made. It was quite clear that the landlord never knew, from first to last, anything about this payment which the old tenant had extracted from the new; and (as is, I think, clear from the judgments in this court) one reason for the decision against the view that this was a premium which could be recovered from anybody was that it was not a payment of a premium as a condition of the grant of a tenancy but the payment of a premium in consideration of somebody procuring the landlord to grant a tenancy—which is, of course, a different thing. But in the course of the judgments the point was debated and stressed by all the judges of this court that if there are two fair constructions of a penal Act you should tend to prefer that construction which does not extend but rather limits the penal consequences of the legislation. Atkin L.J., indeed, went a little further; for he said (and he was speaking of the Act of 1920 [9]): "Therefore "it is plain what was meant by the use of these words in that "Act. They meant the payment of a sum to the landlord in "consideration of a grant by him. . . ." It was conceded that that was, in the circumstances, a mere dictum. Atkin L.J.'s expression of opinion that the prohibited payment must be limited to a payment to the landlord is not found in the judgment of Bankes L.J. or of Scrutton L.J. Nevertheless, it is a point of substance and, I think, of difficulty, whether now, in 1959, we should hold that the *Birmingham* case [10]—though rightly decided —contains statements, as reasons, which went further than was required for the decision and which in our view were erroneous. On the whole I have come to the conclusion that we ought not now to hold that the *Birmingham* case [10] governs the present action. That the judge felt so compelled to hold is, of course, plain. But the reasoning of the Divisional Court in the *Birmingham* case [10] is not binding upon us, and I am not satisfied that there is, upon a true construction of the plain words of this section, a sufficient doubt as would justify me, contrary to my own view, in saying that the reasoning—or part of the reasoning, because that is all it amounts to—in the *Birmingham* case [10] ought to be sustained by this court, and that the matter is one which (if it thinks fit) Parliament ought to remedy. After all, I cannot think that many landlords, seizing upon these observations of Lord Goddard C.J.'s in the *Birmingham* case,[10] would have said: "It is all right; we can require payment of a premium "so long as it is not to us"; or that, if they had done so, they would have done so with a very clear conscience.

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[7] [1951] 2 K.B. 54.

[8] [1921] 3 K.B. 404.

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[9] [1921] 3 K.B. 404, 411.

[10] [1951] 2 K.B. 54.

I, therefore, answer both parts of the first question formulated earlier in this judgment in favour of the plaintiff and adversely to the defendants.

There then arises the second question—also I think a difficult one: From whom is the premium which, on my construction, has been paid, recoverable? Again, the Act is perhaps strangely silent, save for the necessary inference from subsection (6). If I may refer to it again by way of reminder, that subsection provides that the person requiring the premium may be liable to summary conviction, "and the court by which he is convicted "may order"—and it is, of course, discretionary—" the amount "of the premium, or so much thereof" (etc.) "to be repaid to "the person by whom it was paid." That subsection at least shows plainly, if my view is so far right, that the person requiring the premium, even though he has not received it, may be ordered to repay it.

Mr. Dehn has said that if he is wrong on the first question, then it must follow that the premium is repayable from anybody, both him who required it and him who received it. I am not satisfied that that is so. Nor, indeed, is it necessary for this decision that I should express any view about it. I do not, therefore, express any view whether, if the Pegasus company had been sued, they might have been held liable to repay. This much, however, is clear, that the Pegasus company would not be within the terms of subsection (6), for the Pegasus company did not "require" the premium, within the contemplation of the section, seeing that they were not, and were never intended to be, parties to the grant of the tenancy. But it is also possible (as appeared from examples taken during the course of the argument) that you might have a recipient of a premium, of a pecuniary consideration, who was himself quite innocent of its being a result of any requirement by a landlord as a condition of granting a tenancy. In those circumstances, I am not, as at present advised, prepared to say, and do not say, because it is unnecessary to say, whether anybody but the landlord is liable to pay back (in the sense in which I have used that phrase) the premium. But I do say that, having regard to the general context of the section, and subsection (6) in particular, I am satisfied that a landlord who required a premium is liable to pay it back even though he himself did not receive it.

In the circumstances, there remains only the third and subsidiary question, already indicated: Is Mr. White entitled to recover the full £500 or only half that sum, £250? I note that the point which I am now upon was not specifically taken in the defendants' pleading, though I am prepared to assume, particularly having regard to the plea in paragraph 2 of the defence, denying that the plaintiff paid a premium "of £500 or any sum," that it is open to the defendants to take the point. But the result of the absence of any specific plea is that all the evidence available to show what were the exact beneficial and other interests in the property 174, The Heights, of the plaintiff and his wife has to be derived from the statement by the plaintiff in cross-examination in which he certainly assumed—and there is no reason to suppose wrongly assumed—that the beneficial interests in the house were as between himself and his wife equal. But the conveyance (for example) from the plaintiff and his wife to the Pegasus company was not produced. I think, however, Mr. Dehn conceded (if I followed him) that the purchase price of £1,800 was in fact paid to the plaintiff and his wife jointly and that as owners they jointly conveyed the property to the Pegasus company.

The matter is not, I think, one that admits of long or elaborate argument, but on the whole I conclude that the right answer must be that the plaintiff and his wife are to be treated as having jointly paid the premium of £500 by way of deduction from the sum of £2,300 which otherwise would have been paid to them jointly and, therefore, they are jointly entitled to recover it from the landlord. In the circumstances it follows, as I think, that the plaintiff is entitled—in the absence of any objection (and there has been none) to his wife not being joined as co-plaintiff—to recover the full sum of £500. What he does with the £500 as between himself and his wife is a matter with which the defendant company is not in the least concerned.

It follows, for the reasons which I have attempted to state, that in my judgment the right answer to this case is that which the judge himself (apart from this last point, with which he did not deal) would have directed, had he felt himself free so to do: in other words, I think that the plaintiff is entitled to judgment for £500, being repayment to him of a premium, payment of which was unlawfully required by the defendant landlord as a condition of the grant of a tenancy.

Ormerod L.J. I agree that this appeal should be allowed.

Mr. Dehn, on behalf of the defendants, has conceded that the premises in question are premises to which section 2 of the Landlord and Tenant (Rent Control) Act, 1949, applies. He also agrees that whatever was required of the plaintiff was required as a condition of the grant of a tenancy, and that it was required by the defendants through their agents, the firm of estate agents.

There are two main questions, therefore, to be decided. The first is: Did the defendants, in requiring the plaintiff to sell his house at £500 less than the agreed value as a condition of granting him a tenancy, require him to pay a premium in addition to the rent? The second question is: If so, was it any less a premium because the plaintiff was required to sell to the Pegasus company and not to the defendants?

Mr. Dehn argued, with considerable force, that the answer to the first question must be in the negative. He submitted that there was nothing in the nature of a payment in the transaction and therefore it could not come within the section. He drew attention to section 8 of the Act of 1920 (to which Lord Evershed M.R. has already referred), where the words were, "the payment "of any fine, premium, or other like sum, or the giving of any "pecuniary consideration, in addition to the rent." He argued that the effect in the Act of 1949 of leaving out the word "giving" and relating the word "payment" to the words "pecuniary "consideration" as well as "premium" must be taken as meaning that "pecuniary consideration" was intended to mean nothing more than some form of payment such as handing over a cheque or perhaps some similar negotiable instrument. I cannot for my part agree that it was the intention of the legislature to narrow the scope of the expression "pecuniary consideration" in this way. As has already been pointed out, the purpose of the Act was further to restrict the requiring of premiums and not to ease the restrictions already imposed. According to section 18 (1) of the Act of 1949, the expression "premium" includes "any other pecuniary consideration in addition to the rent." There can be no doubt that on the facts found by the county court judge there was consideration. The plaintiff was required to do something he was under no legal obligation to do. He was required to sacrifice a sum of £500 on the sale of his house. That, in my view, must be as much a "pecuniary consideration" as if he had been required to make the actual payment of £500 in cash.

Though, of course, it is in no way conclusive, it is interesting to see from the evidence how the parties themselves regarded this transaction. It happened that some time after the plaintiff had been in possession of his flat he went to see the agent about some repairs to the premises which he had asked should be done, and he saw the agent in his office. The agent apparently denied that the plaintiff had asked for repairs to be done, and the plaintiff said: "I cannot understand you people. You have already "had £500 out of me. I think you are a pack of swindlers." The agent, not unnaturally, said: "You cannot talk like that. "You must get out of the office." Then the plaintiff went on to say: "When I mentioned the £500 he said 'I did not have "'it.'" It is clear that, whatever the legal effect of the transaction, the parties themselves were regarding it as being one where the sum of £500 had been paid by the plaintiff to somebody, and Mr. Williamson, the agent, was saying: "It was not "paid to me." That is, as I have said, in no way conclusive, but it does point, I think, to what the reality of the transaction was in the minds of the parties, and that was, that here you had a house the agreed value of which was £2,300 and it was agreed that that house should be sold, as a condition of the grant of a tenancy, to another person, the Pegasus company, for a sum which was agreed to be £500 less than the agreed price. That, to my mind, must be as much a "pecuniary consideration" as if there had been an actual payment of that sum of £500.

On the second question such a consideration is, in my judgment, none the less a "premium" within the meaning of the section because the plaintiff was required to sell his house to a third person, the Pegasus company, and not to the defendants. It is one of the fundamental principles of the doctrine of consideration that it must move from the promisor but need not move to the promisee. Here the consideration moved from the promisor, the plaintiff, although it did not actually move to the promisee, the defendants, but to another party. Mr. Dehn agreed in the course of the argument that if the word "pecuniary" had been left out of the definition in section 18 and the word "consideration" was without qualification, he might be in a difficulty on that part of his argument, and I find it hard to understand why there should be any difference in the position because the consideration must, according to the definition, be a pecuniary one.

Mr. Dehn sought support for his argument in a number of authorities where the word "premium" was held to be a payment of a sum of money to the lessor. For my part, I did not feel that the court could derive assistance from the interpretation of an expression used in statutes dealing with matters so far removed from the one under consideration. The county court judge would have decided the case in favour of the plaintiff had he not felt himself bound by the decision of the High Court in *Rex* v. *Birmingham* (*West*) *Rent Tribunal*,[11] to which reference has already been made by Lord Evershed M.R. Mr. Dehn of course relied strongly on this case, and particularly on the words of Lord Goddard C.J., to which reference has been made, when he said[12]: "In the present case I prefer to base my judgment "on the proposition that, on its true construction, this Act was "intended to apply only to a pecuniary consideration paid to the "landlord." The case was very different from the one under consideration. There was an agreement between a landlord, a tenant, and a builder, for the builder to convert a part of a house into a flat, and for the tenant to pay the builder the sum of £500 as his share of the cost, it being agreed that the landlord would grant a tenancy when the work was done to the satisfaction of the surveyor. There was no question of payment to the landlord: a payment was to be made to the builder in return for work done. There was no question, as in the present case, of the money being paid to a nominee of the landlord.

I agree with Lord Evershed M.R. that if Lord Goddard C.J.'s words mean that a "premium" is a sum of money which must be paid as it were into the pocket of the landlord, then the judgment went further than was necessary to decide that case; and I would agree that those words cannot now be supported. It appears to me that the proper construction of these words is that a "premium" is a sum of money which is paid to the landlord or to his order, and if those words are included then the dictum of Lord Goddard C.J. can be reconciled with the position as I think it is. The county court judge has found here that the defendants made no profit in this transaction. So far as that means that there is no evidence of any profit having been made, I would agree with him; but it does not, in my view, make any difference to the position. For a landlord to require that a payment shall be made to a third person seems to me to be nothing more than for him to specify the manner in which payment shall be made; and I think there is considerable force in the argument that a payment made to the order of the landlord is a payment made to the landlord. I am satisfied that in these circumstances this transaction comes within the section and that the sum of £500 is recoverable, and is recoverable from the defendants, by virtue of section 2 (5) of the Act of 1949.

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[11] [1951] 2 K.B. 54.

[12] Ibid. 58.

There is nothing I wish to add on the question whether the plaintiff should receive the sum of £500 or only £250. I agree with the view expressed by Lord Evershed M.R. that he is entitled to recover the full sum of £500.

I would, therefore, allow this appeal.

WILLMER L.J. I am of the same opinion.

There are four questions which have been raised in this case: First—leaving aside for the moment the question to whom payment was made—can it be said that the defendants did require payment of any premium at all? Second, does the fact that payment was required to be made to a third party make any difference? Third, if a premium was "required" within the meaning of the Act, is it recoverable from the defendants? And fourth, if any sum is recoverable, is that sum the full amount of £500 or only £250, having regard to the fact that the plaintiff and his wife were joint owners of the house that was sold?

As to the first point, I can state my views very briefly. To my mind, there can be no doubt but that the plaintiff suffered a detriment such as would constitute perfectly good consideration within the ordinary law of contract. Equally, it seems to me, there can be no doubt that that detriment was a pecuniary detriment, in the sense that it represented a sacrifice of £500. Again, in my judgment, there can be no doubt that the defendants required a "payment" to be made. It is true that no actual money passed, but I venture to point out that a taxpayer is none the less a taxpayer because income tax which he owes is deducted at source. Similarly, the plaintiff and his wife in this case none the less "paid" £500 because it was deducted from the purchase price of the house that they had for sale.

As to the second point—namely, whether the fact that payment was made to a third party makes any difference—as has already been pointed out by Lord Evershed M.R., the Act says nothing about the premium being paid to the landlord. Indeed, the existence of subsection (2) of section 2 shows that there must in some cases be circumstances in which a premium may be payable to somebody other than the landlord. On general principles I am very much exercised by the consideration that, unless the Act is held to cover a payment made in such circumstances as those of this case, it can so easily be evaded by an unscrupulous landlord by the simple expedient of directing payment of the premium to some third party. If so, the Act would very soon become a dead letter, because that is what every unscrupulous landlord would do. I share the doubts expressed by my brethren as to the value of citing dicta from other cases where the words "premium" or "payment of a premium" were considered in other contexts; and I think I may usefully refer to what was said by Lord Evershed M.R. in *Woods* v. *Wise*,[13] where he adverted to this very point, namely, the danger of applying literally what was said, for instance, about the word "premium" in the context of Finance Acts. We are here considering the word in the context of the Rent Acts, which form a wholly different background.

As it seems to me the junior counsel for the plaintiff put his finger upon the real point in relation to this aspect of the case when he pointed out that, under the ordinary law of contract, payment as directed by the party entitled to payment is held to be good consideration. I can see no reason why payment to Pegasus in this case, as directed by the defendants, should not be regarded as good consideration within the section.

The only obstacle in the way of this construction of the Act is, of course, the decision of the Divisional Court in what has been described as the *Birmingham* case.[14] My Lords have both dealt very fully with that case, and I see no object in going over it again. All I desire to do is to express my complete concurrence with what has been said by my Lords about that case; and in the circumstances I do not think that that decision can be regarded as any obstacle in the way of our holding that this was a payment of a premium, required by the defendant landlords, notwithstanding the fact that payment was directed to be made to a third party.

Passing to the third question, namely, whether, the premium having been paid to a third party, it is now recoverable from the defendants, I desire to do no more than emphasise that, as I read it, section 2 of the Act of 1949 is primarily directed against the person "requiring" the payment of a premium. He is the person who is rendered liable to criminal prosecution under subsection (6), and he is the person who, under that subsection, may in such criminal proceedings be required to repay any premium unlawfully exacted. It seems to me that subsection (5) should be read together with subsection (6); and the conclusion appears to me to follow that the person who "requires" payment of a premium (in this case the landlord) is the person

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[13] [1955] 2 Q.B. 29, 45; [1955] 2 W.L.R. 734; [1955] 1 All E.R. 767.

[14] [1951] 2 K.B. 54.

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Willmer L.J.

against whom primarily the amount may be recovered. It is unnecessary in this case to consider whether a premium unlawfully exacted could or could not be recovered from the person to whom it was paid. The plaintiff in this case has not sought to recover the premium from Pegasus, and it is not necessary to express any view on that point. I am satisfied that it is recoverable from the defendants as being the persons who "required" its payment.

Lastly, with regard to the question whether the full amount is recoverable or only £250, as has already been pointed out, this is not a question that admits of much elaboration. I have come to the conclusion that the full amount is recoverable, on this basis. As I have already pointed out, the payment was made by deduction at source. What was due from Pegasus was a sum representing the purchase price of the house, and it was due to the plaintiff and his wife jointly. The result of the transaction was that a sum less by £500 was paid to the plaintiff and his wife jointly: in other words, the payment by deduction at source was a payment made by the plaintiff and his wife jointly. The contrary view suggested by Mr. Dehn, that this transaction should be looked at as though the whole amount of £2,300 had been received, had then been notionally split up between husband and wife, and each thereafter had notionally paid back £250, seems to me to be wholly unreal, especially bearing in mind the fact that payment was made by deduction at source before the money ever came into the hands of the plaintiff and his wife at all. In those circumstances, I am satisfied that the plaintiff and his wife were jointly concerned in this transaction, and it follows that, no objection having been taken with regard to parties, the plaintiff is entitled in this case to sue for and recover the whole amount.

For those reasons, I am glad to be able to come to the conclusion to which the judge below would obviously have wished to come, and would have come had he not felt himself to be precluded by the decision in the *Birmingham* case.[14]

Appeal allowed.
Leave to appeal to House of Lords.

Solicitors: *M. Phillips & Co.; J. H. Milner & Son.*

E. D.

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[14] [1951] 2 K.B. 54.

[MANCHESTER ASSIZES.]

1959
Mar. 19, 20;
May 4.

Salmon J.

ATTORNEY-GENERAL *v.* HARRIS AND OTHERS.

[1958 H. No. 3211.]

Injunction — Relator action — Attorney-General's discretion — Independent exercise of court's discretion—Repeated breaches of statute to public advantage—Prosecutions for private advantage—Question of public injury.

The defendants had sold flowers from stalls near the entrance to a cemetery in Manchester on almost every Sunday since 1955. The stalls were about 7 feet long, and projected between 2 feet 6 inches and 3 feet 6 inches from the railings of the cemetery into a footway, between 15 and 16 feet wide, used by only a few pedestrians, except on Mothering Sunday. The defendants in trading in this manner committed offences under the Manchester Police Regulation Act, 1844, and in consequence they had been prosecuted after pressure by competitors, and convicted and fined on many occasions; they had continued to trade to the advantage of the public and themselves, providing colour in an otherwise somewhat dismal landscape. The Attorney-General brought this action for an injunction restraining the defendants from committing further breaches of the Act of 1844: —

Held, (1) that notwithstanding that the Attorney-General had exercised his discretion in bringing the action, and that the defendants had contravened the provisions of a statute, it was the duty of the court in all relator actions to inquire whether the acts done by the defendants in truth injured the public; if they did, the fact that the injury was small would not, providing it was real, entitle the court to withhold the injunction; nor would it be germane that the public, though injured, might have received some compensating advantage from the defendants' acts; if, however, it was established that the public had in fact suffered no injury, the court might in the exercise of its discretion refuse an injunction even though there were no means available other than an injunction to prevent the defendants' acts.

Dicta of Farwell L.J. in *Attorney-General* v. *Birmingham, Tame & Rea District Drainage Board* [1910] 1 Ch. 48, 61, and of Devlin J. in *Attorney-General* v. *Bastow* [1957] 1 Q.B. 514, 520; [1957] 2 W.L.R. 340; [1957] 1 All E.R. 497 applied.

(2) That, although a statutory provision could be contravened without public injury only in the most exceptional circumstances, and its breach was prima facie a public wrong, since the acts of the defendants did not tend to injure the public, nor was any member of the public inconvenienced in the slightest degree, and in view of the circumstances of the prosecutions, an injunction would be refused.

[Reported by DONALD HART, Esq., Barrister-at-Law.]

Attorney-General v. *Kerr and Ball* (1914) 79 J.P. 51; 12 L.G.R. 1277 applied.

Attorney-General v. *Cockermouth Local Board* (1874) L.R. 18 Eq. 172; *Attorney-General* v. *Shrewsbury (Kingsland) Bridge Co.* (1882) 21 Ch.D. 752; *Attorney-General* v. *London & North-Western Railway Co.* [1900] 1 Q.B. 78; 16 T.L.R. 30 distinguished.

ACTION.

The Attorney-General, suing on the relation of the Manchester Corporation, alleged that since 1956 Robert Harris, Audrey Harris (his wife) and Jack Ferst had habitually erected stalls on a footway near the entrance to Southern Cemetery, Manchester, had placed there boxes, vases and buckets containing flowers, and had exposed such flowers for sale so as to obstruct or incommode the passage of the footway, contrary to section 102 of the Manchester Police Regulation Act, 1844.[1] It was further alleged that Robert Harris had been convicted and fined in respect of breaches of the Act on 74 occasions, Audrey Harris on 34 occasions, and Jack Ferst on 81 occasions, but they had continued to commit similar breaches. The Attorney-General contended that the penalties imposed under the Act had proved insufficient to secure compliance, and that the defendants intended to continue to trade in breach thereof, and claimed an injunction against each of the defendants perpetually restraining them from placing or using any stall or other article upon any footway within the City of Manchester, and from exposing for sale upon or near any such footway any flower or other article so as to obstruct or incommode the passage of such footway.

Robert and Audrey Harris, by a defence filed before solicitors who were instructed to act on their behalf, alleged that they were registered street traders, licensed to trade by selling flowers in any street in the City of Manchester with certain exceptions not relevant to this action; that street traders selling flowers at other cemeteries had never been prosecuted; that prior to 1956 flowers had been sold outside Southern Cemetery for 35 years without any prosecution being brought; that the prosecutions only began when certain adjacent shopkeepers ceased to trade

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[1] Manchester Police Regulation Act, 1844, s. 102: "Every person "shall be liable to a penalty of not "more than 40 shillings who in any "street shall commit any of the fol- "lowing offences . . . Every person "who shall . . . place or use any ". . . stall . . . on any footway . . . "Every person who shall . . . by "hawking or exposing for sale any ". . . article, on or near any foot- "way, or by any other means shall "obstruct or incommode the free "passage of any such footway, or "who shall insult, jostle, or annoy "any inhabitant or passenger."

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from stalls outside the cemetery; and that the proceedings were in the nature of victimisation, brought at the instigation of the shopkeepers in furtherance of what was in reality a trade dispute. The defendant Ferst did not file a defence, but was present at the trial, which took place in Manchester, and gave evidence. The facts are fully set out in the judgment.

Fenton Atkinson Q.C. and *J. M. Lever* for the plaintiff. The defendants have committed repeated breaches of section 102 of the Manchester Police Regulation Act, 1844, a public Act, by placing stalls on the footway in Princess Road. They have on many occasions been convicted and fined, but have continued to act in defiance of the Act, even as recently as last Sunday. Attempts to deal with this conduct by the statutory penalties having failed, an injunction is now sought by the Attorney-General in a relator action.

It is submitted that once the Attorney-General in the exercise of his discretion has concluded that a case is an appropriate one for an injunction, and accordingly put into operation the machinery of a relator action, it is the practice of the courts to grant an injunction as a matter of course. In *London County Council* v. *Attorney-General* [2] Lord Halsbury said: "It may well "be true that the Attorney-General ought not to put into opera- "tion the whole machinery of the first law officer of the Crown "in order to bring into court some trifling matter. But if he did, "it would not go to his jurisdiction: it would go, I think, to the "conduct of his office, and it might be made, perhaps in Parlia- "ment, the subject of adverse comment; but what right has a "court of law to intervene? If there is an excess of power "claimed by a particular public body, and it is a matter that "concerns the public, it seems to me that it is for the Attorney- "General and not for the courts to determine whether he ought "to initiate litigation in that respect or not." In the most recent case on this matter, *Attorney-General* v. *Bastow*,[3] Devlin J. said: "I distinguish, therefore, between administrative discretion and "judicial discretion. The Attorney-General, as I say, is the "officer of the Crown who is entrusted with the enforcement of "the law. If he, having surveyed the different ways that are "open to him for seeing that the law is enforced and that it is "not defied, has come to the conclusion that the most effective

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[2] [1902] A.C. 165, 168.

[3] [1957] 1 Q.B. 514, 522; [1957] 2 W.L.R. 340; [1957] 1 All E.R. 497.

"is to ask this court for a mandatory injunction—and I am satis-"fied that the very nature of a relator action means that he has "surveyed those ways and has come to that conclusion—then I "think that this court, once that a clear breach of the right has "been shown, should only refuse the application in exceptional "circumstances."

Alternatively it is submitted that the position is correctly stated in Halsbury's Laws of England [4]: "Where there has been "a clear and deliberate breach of a duty imposed by statute, an "injunction follows as a matter of course." This proposition has its origin in *Attorney-General* v. *Wimbledon House Estates Co. Ltd.*,[5] and is supported by considerable authority: *Attorney-General* v. *Bastow* [6]; *Attorney-General* v. *Sharp* [7]; *Attorney-General* v. *Premier Line* [8]; *Attorney-General* v. *Ashborne Recreation Ground* [9]; *Attorney-General* v. *Shrewsbury (Kingsland) Bridge Co.*[10] In *Attorney-General* v. *Cockermouth Local Board* [11] Jessel M.R. said: "It is not necessary for the Attorney-General "to show any injury at all. The legislature is of opinion that "certain acts will produce injury, and that is enough." In *Attorney-General* v. *London & North-Western Railway Co.*[12] A. L. Smith L.J. said that it is not for the court to inquire whether a breach of statute is injurious to or for the benefit of the public. It is submitted, therefore, that if the law is disobeyed and defied it is not open to the court to say that this is not a serious offence. The extent of the nuisance does not matter.

Rose Heilbron Q.C. and *Ivor R. Taylor* for the defendants, Robert and Audrey Harris. There are clear divisions in the types of cases where an injunction will be granted. The cases relied upon on behalf of the Attorney-General, such as *Attorney-General* v. *Sharp* [13] and *Attorney-General* v. *Premier Line*,[14] concern a breach of a duty imposed by statute, as does the passage quoted from Halsbury's Laws of England. In a second type of case, the courts do not grant an injunction unless the plaintiff can establish something in the nature of a common law nuisance. See *Lyons, Sons & Co.* v. *Gulliver*.[15] The following passage is also to be found in Halsbury's Laws of England [16]: "Where a statute

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[4] 3rd ed., vol. 21, p. 403.
[5] [1904] 2 Ch. 34; 20 T.L.R. 489.
[6] [1957] 1 Q.B. 514; [1957] 2 W.L.R. 340; [1957] 1 All E.R. 497.
[7] [1931] 1 Ch. 121; 46 T.L.R. 554.
[8] [1932] 1 Ch. 303; 48 T.L.R. 104.
[9] [1903] 1 Ch. 101; 19 T.L.R. 39.
[10] (1882) 21 Ch.D. 752.
[11] (1874) L.R. 18 Eq. 172, 178.
[12] [1900] 1 Q.B. 78; 16 T.L.R. 30.
[13] [1931] 1 Ch. 121.
[14] [1932] 1 Ch. 303.
[15] [1914] 1 Ch. 631.
[16] 3rd ed., vol. 21, p. 347.

"merely creates an offence, without creating a right of property, "and provides a summary remedy, a person aggrieved is confined "to the summary remedy and cannot claim an injunction, "although proceedings may be brought by the Attorney-General "if the public interest is affected." These proceedings were commenced at the instigation of business competitors, and the public interest is not affected. If the Manchester Corporation had taken the view that the public interest was affected they could have used their powers to prevent the defendants from trading at any time up to the decision in *Brownsea Haven Properties* v. *Poole Corporation* [17] in 1957. In *Attorney-General* v. *Kerr and Ball* [18] Lush J. refused an injunction to restrain breaches of by-laws on the ground that there had been no public injury. Nor is this a case of an injunction to restrain a nuisance, of which there is no evidence. In *Attorney-General* v. *Bastow*,[19] where Devlin J. granted an injunction, questions of public health were involved. In *Attorney-General* v. *Sheffield Gas Consumers Co.*[20] an injunction was refused on the ground that there was not such a nuisance as to warrant an injunction. See also *Attorney-General* v. *W. H. Smith & Sons* [21] and *Fabbri* v. *Morris*.[22] The defence further say that the stalls do not incommode the passage of the footway within the meaning of the Act of 1844. In this case there has been no attempt to show any public injury—there was substantial injury to the public in all the cases cited on behalf of the Attorney-General.

Atkinson Q.C. in reply. The right of free passage extends over the whole footway. A clear breach of a public statute has been shown. In *Attorney-General* v. *Kerr and Ball* [23] Lush J. was dealing with a breach of by-laws, not of a public statute. *Attorney-General* v. *London & North-Western Railway Co.*[24] remains authority for the contention that once Parliament has forbidden a particular act the courts cannot examine whether it is in fact harmful.

MAY 4. SALMON J. read the following judgment, in London. The Manchester Southern Cemetery is situated on the outskirts of the City of Manchester at West Didsbury and is bounded on one side by Princess Road and on another side by the Barlow Moor Road. The Princess Road footway is contiguous with the cemetery; it is between 15 and 16 ft. wide and is divided from the cemetery by iron railings. On this footway close to the iron railings there is a line of trees about 50 ft. apart. Opposite the cemetery there are playing fields adjacent to Princess Road and the Barlow Moor Road; in the latter road there is a number of shops, including several florists shops. Nearly every Sunday, since about the middle of 1955, the defendants have sold flowers from stalls placed close to the railings between two trees to the left of a pedestrian entry to the cemetery. Except for Mothering Sunday there are never more than a few pedestrians using this very wide footway. On very rare and isolated occasions the defendants may have placed their stalls on that part of the footway which is adjacent to a lay-by. The defendant Robert Harris and his wife Audrey Harris operated from one stall about 7 ft. long and which projected between some 2 ft. 6 ins. and 3 ft. 6 ins. from the railings. The defendant Ferst operated from an adjacent stall of similar dimensions. I entirely accept the evidence of the defendant Robert Harris and the defendant Ferst who impressed me as being respectable citizens and reliable witnesses. I am satisfied that in offering flowers for sale in the manner I have described, they were not causing the slightest nuisance or inconvenience to the public using the footway in Princess Road. They were carrying on a business which was to the advantage of the public as well as of themselves and no doubt providing a splash of colour in an otherwise somewhat dismal landscape. It seems clear that no prosecution would ever have been instituted against the defendants but for the considerable pressure which was brought to bear upon the Manchester Corporation by the owners of some of the florists shops in the Barlow Moor Road. It appears from the letters of the town clerk in the agreed correspondence that after the practice now complained of had been going on for many months and had been observed and reported on by the police and by the city surveyor and engineer, the unanimous conclusion was reached by the police, the highways committee and the town clerk that no action could justifiably be taken against the defendants, a decision with which I am not disposed to differ. [His Lordship referred to the correspondence and continued:]

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[17] [1958] Ch. 574; [1958] 2 W.L.R. 137; [1958] 1 All E.R. 205.

[18] (1915) 79 J.P. 51; 12 L.G.R. 1277.

[19] [1957] 1 Q.B. 514; [1957] 2 W.L.R. 340; [1957] 1 All E.R. 497.

[20] 3 De G.M. & G. 304.

[21] 26 T.L.R. 482.

[22] (1947) 63 T.L.R. 34; [1947] 1 All E.R. 315.

[23] 79 J.P. 51.

[24] [1900] 1 Q.B. 78; 16 T.L.R. 30.

It would appear from these letters that the help of two councillors had been enlisted on behalf of the florists, and that they had apparently had interviews with the town clerk. After some further correspondence, and possibly some further interviews in which it was argued that the flower stalls operated by the defendants constituted unfair competition, the decision to which I have referred was reversed, and in February, 1956, the first of a large number of prosecutions was instituted against the defendants. These prosecutions were brought for two offences under section 102 of the Manchester Police Regulation Act, 1844. I do not pause to consider whether the defendants were competing fairly or unfairly with the florist shops because on no view could the mischief aimed at by any part of section 102 have been unfair competition. The section is a compendious one creating several hundred petty offences for each of which it imposes a maximum penalty of forty shillings. In so far as it is material to the present case the section enacts that every person commits an offence " who shall . . . place or use any . . . stall on any foot- " way," and every person commits an offence " who shall . . . by " hawking or exposing for sale any . . . article on or near any " footway or by any other means shall obstruct or incommode " the free passage of any such footway."

There can be no doubt but that the defendants committed offences under this statute every time they offered flowers for sale outside the cemetery in the way I have described. The defendants did place a stall against the railings, which projected a little onto this very wide footway, and accordingly this stall technically obstructed that part of the footway on which it rested although it did not in the slightest incommode anyone using the footway. I find that the obstruction was so slight and inappreciable that it certainly did not amount to nuisance. Accordingly, if any proceedings had been brought against these defendants based on nuisance, such proceedings would have been doomed to failure. See *Attorney-General* v. *Wilcox* [1] and *Rex* v. *Bartholomew*.[2] The defendants, however, have been prosecuted under the statute of 1844 on a very large number of occasions. Although the offences were trifling and caused not the slightest injury to the public, since they had been committed the magistrate had no course open to him other than to convict; as a rule he marked his view of the triviality of the matter by the smallness of the fines imposed even after many convictions. The last twenty-two fines for obstruction recorded against the defendant Robert Harris are for 2s. 6d. each. In spite of the convictions and fines over a number of years, the defendants continued and continue to ply their trade outside the cemetery, and thereby to commit the technical offences to which I have referred. These are the circumstances in which the town clerk was authorised to apply to the Attorney-General that all necessary steps should be taken to obtain an injunction against the defendants. This action was then instituted.

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[1] [1938] Ch. 934; 54 T.L.R. 985; [1938] 3 All E.R. 367.

[2] [1908] 1 K.B. 554, 561; 24 T.L.R. 238.

It is conceded that the granting of an injunction is discretionary. Mr. Fenton Atkinson on behalf of the plaintiff, however, argues that since the Attorney-General has in the exercise of his discretion come to the conclusion that an injunction should be granted, and accordingly brought this action, the court must exercise its discretion by granting an injunction. I reject this argument. In support of this argument Mr. Atkinson relied chiefly upon *London County Council* v. *Attorney-General.*[3] In that case Lord Halsbury observed[4]: "It may well be that it is "true that the Attorney-General ought not to put into operation "the whole machinery of the first law officer of the Crown in "order to bring into court some trifling matter. But if he did, "it would not go to his jurisdiction: it would go, I think, to the "conduct of his office, and it might be made, perhaps in Parlia-"ment, the subject of adverse comment; but what right has a "court of law to intervene? If there is excess of power "claimed by a particular public body, and it is a matter that "concerns the public, it seems to me that it is for the Attorney-"General and not for the courts to determine whether he ought "to initiate litigation in that respect or not." That no doubt is perfectly accurate, but as was pointed out by Farwell L.J. in *Attorney-General* v. *Birmingham, Tame & Rea District Drainage Board,*[5] *London County Council* v. *Attorney-General*[6] decided no more than that: "It is for the Attorney-General to determine "whether he should commence litigation but it is for the court "to determine what the result of that litigation shall be. . . . "That is to say, the court cannot say, 'You ought never to have "'instituted these proceedings': it must listen to his applica-"tion and then adjudicate whether an injunction should be "granted or not." In my judgment it is the duty of the court in making this adjudication to exercise its discretion quite independently of the discretion exercised by the Attorney-General. He is for this purpose in no better position to obtain judgment in his favour than any other litigant claiming an injunction.

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[3] [1902] A.C. 165; 18 T.L.R. 298.

[4] [1902] A.C. 165, 168.

[5] [1910] 1 Ch. 48, 61 (C.A.); [1912] A.C. 788.

[6] [1902] A.C. 165.

In *Attorney-General* v. *Bastow*,[7] Devlin J. points out: "The fact that the Attorney-General asks for the injunction does "not mean that the court must grant it, even if a clear and "deliberate invasion of a public right is proved. The court still "has its discretion in the matter and it must have regard to the "circumstances to which it usually has regard in considering "whether or not it will grant this type of relief." It is true that towards the end of his judgment there occurs the passage on which Mr. Atkinson relies. It reads as follows[8]: "I distinguish "between administrative discretion and judicial discretion. The "Attorney-General . . . is the officer of the Crown who is entrusted with the enforcement of the law. . . . If he, having "surveyed the different ways that are open to him for seeing that "the law is not defied, has come to the conclusion that the most "effective way is to ask this court for a mandatory injunction . . . "then I think that this court, once a clear breach of the right "has been shown, should only refuse the application in exceptional circumstances." But Devlin J. added[9]: "I am dealing "purely with that type of case in which the only substantial "ground for not granting an injunction is that there are other "remedies available. In cases where other circumstances which "are not primarily a matter for administrative discretion arise, "then different considerations might apply and a different view "be taken." In that case the defendant's acts in their nature tended indubitably to injure the public. The only real question for decision was one which may be regarded as primarily a matter of administrative discretion, namely, whether there were other remedies available more appropriate than an injunction.

But the present case, however, in my view depends upon whether what the defendants are doing in any way injures the public; and this is not a matter upon which the discretion of any officer of the Crown can have any influence upon the court. As I have indicated, I have no hesitation in holding on the special circumstances of this case that the defendants have caused no injury to the public. I do not, however, hold that there are any means available other than an injunction to prevent these defendants from doing what they are doing.

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[7] [1957] 1 Q.B. 514, 520, 521; [1957] 2 W.L.R. 340; [1957] 1 All E.R. 497.

[8] [1957] 1 Q.B. 514, 522.

[9] Ibid. 523.

This seems to me to be a similar case to *Attorney-General* v. *Kerr and Ball*,[10] where Lush J. refused an injunction although there had been persistent breaches of certain by-laws on the ground that no public injury had been suffered, and that in all the circumstances of the case it was not desirable that an injunction should be granted. It was sought to distinguish that case from the present on the ground that it concerned breaches of by-laws whereas this case concerns breaches of a public Act of Parliament. I cannot think that distinction makes any difference. Indeed Lush J. points out that by-laws impose a public duty and that their breach is prima facie a public wrong although on the facts of that case the breaches did not in reality injure the public.

It is further argued on behalf of the Attorney-General that if in a relator action he can show a clear and deliberate breach of an Act of Parliament, then an injunction is granted as a matter of course, not only on the ground with which I have already dealt, namely, that the court is virtually bound by the exercise of the Attorney-General's discretion, but also on the ground that the doing of the acts prohibited by statute is deemed to constitute a public injury and it is not competent for the courts to inquire whether or not such acts in fact injure the public.

This contention is difficult to reconcile with the two decisions in *Attorney-General* v. *Kerr and Ball*,[10] and with the observations of Devlin J. in *Attorney-General* v. *Bastow*.[11] It does, however, at first sight appear to gain some support from certain dicta relied upon by Mr. Atkinson if those dicta are looked at out of their context. When, however, they are considered in their context, and that context is analysed, they do not in my judgment establish Mr. Atkinson's contention. He relies particularly on the following passage from the judgment of Sir George Jessel M.R. in *Attorney-General* v. *Cockermouth Local Board*,[12] which reads as follows: "It is not necessary for the Attorney-General to show any injury "at all. The legislature is of opinion that certain acts will "produce injury, and that is enough." In that case the defendants had constructed works for the removal of the sewage of Cockermouth with an outfall into the river Derwent outside the defendants' district and in that of the Workington Local Board. This the defendants were empowered to do only by virtue of certain Acts of Parliament which, in effect, imposed a condition that the defendants should not deteriorate the purity of the water in the river. The sewage polluted the river at a point—eight miles from the town of Workington—where it entered the river. No polluted water, however, arrived at the town of Workington. It was held on the information at the relation of the clerk of the Workington Local Board that an injunction should be granted but that the bill of the local board of Workington alleging nuisance must be dismissed.

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[10] (1915) 79 J.P. 51; 12 L.G.R. 1277.

[11] [1957] 1 Q.B. 514.

[12] (1874) L.R. 18 Eq. 172, 178.

The basis of the decision stated by the Master of the Rolls was that as the Act of Parliament gave the defendants the power only on certain terms to do something which would otherwise be illegal, that is, the discharging of sewage into the river outside their own district, they could not take that power without observing the terms upon which it was granted. The Master of the Rolls, in making the observations upon which Mr. Atkinson relies, was, I think, only pointing out that in the circumstances of the case it mattered not, so far as the case for an injunction was concerned, that the defendants' breach caused no nuisance to the inhabitants of the town of Workington. Moreover, as was stated by Fry J. in the case to which I next refer, the pollution of the river was something which in its nature tended to the public injury.

In *Attorney-General* v. *Shrewsbury* (*Kingsland*) *Bridge Co.*[13] the defendants without any power did certain acts which undoubtedly tended in their nature seriously to interfere with public rights, and so tended to injure the public. These acts consisted of driving piles into the river Severn for the construction of a bridge and interfering with a public highway and with the towing path of the river; no evidence was called of actual damage to the public by reason of these acts. Since, however, the defendants' acts in their nature tended to the public injury it was unnecessary for the plaintiff to adduce evidence of actual injury. It is to be observed that in that case there was no evidence called by the defendants, nor on the facts of the case could there have been any acceptable evidence that public injury had not been caused by, or was not to be apprehended from, the defendants' acts. There seems to be a sensible difference between what the defendant company did in that case, and what the defendants have done in this case. The basis of Fry J.'s decision to grant the injunction was that the defendant company's acts were not only illegal but were acts which in their nature tended to injure the public.

[13] (1882) 21 Ch.D. 752.

In *Attorney-General* v. *London & North-Western Railway Co.*,[14] the Trent Valley Railway Act, 1845, incorporating the Railway Clauses Consolidation Act, 1845, empowered the defendants to carry their railway across a certain highway providing they ran their trains over the crossing at no more than four miles per hour. The defendant company exercised the power and then proceeded to run 120 trains in every 24 hours over the crossing at speeds much in excess of four miles per hour. In the action it was contended by the defendants that the public was not injured by the speed of the trains, and indeed if the trains ran over the crossing only at four miles per hour the crossing would be closed to the public for much longer than under the system then operated by the defendants. The court granted the injunction and Mr. Atkinson relies on the following passage in the judgment of A. L. Smith L.J.[15]: " . . . the legislature having prohibited the running of "trains over this crossing which adjoins a railway station at a "greater . . . speed than four miles per hour, the question whether "it is for the benefit of the public to run trains over it at a "greater speed is one with which we in a court of law have "nothing to do." This passage also must, however, be considered in its context. The basis of the decision stated in the judgments of the Court of Appeal was that to run a train across a highway without statutory permission was an act which in its nature tended to injure the public, and indeed constituted a serious public nuisance. The defendant company had statutory permission to run its trains across the highway but only on condition that it did so at no more than four miles per hour. In breaking this condition the defendant company was committing a nuisance in a highway and was unable to defend itself by showing that it was complying with the terms upon which it had statutory permission to cross the highway. In these circumstances it was not germane for the court to consider whether a speed in excess of four miles per hour benefited or injured the public.

Notwithstanding that the Attorney-General has exercised his discretion in bringing the action, and that the defendants have contravened the provisions of a statute, in my judgment it is the duty of the court in all relator actions to inquire whether the acts done by the defendants in truth injured the public. If they did, the fact that the injury was small would not, providing it was real, entitle the court to withhold an injunction; *Attorney-General* v. *Wimbledon House Estates Co. Ltd.*[16] Nor would it be germane that the public, though injured, may have received some compensating advantage from the defendants' acts; *Attorney-General* v. *London & North Western Railway Co.*[17] If, however, it is established that the public has in fact suffered no injury as a result of the defendants' acts, the court may in the exercise of its discretion refuse an injunction. In every reported case the acts relied on by the plaintiff in actions such as these have clearly tended to the public injury. I have, moreover, searched the reports in vain for any relator action in which the acts complained of were as trivial, or even approached the triviality of the acts relied on in this action.

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[14] [1900] 1 Q.B. 78; 16 T.L.R. 30.

[15] [1900] 1 Q.B. 78, 85.

[16] [1904] 2 Ch. 34; 20 T.L.R. 489.

Undoubtedly it is only in the most exceptional circumstances that any statutory provision can be contravened without public injury. The circumstances of this case are, however, most exceptional. The acts done by the defendants do not on the very special facts of this case tend to injure the public, and indeed I am completely satisfied that no member of the public has been in the slightest degree inconvenienced by the defendants. I am uneasy, too, about the circumstances in which the prosecutions were originally launched. I do not consider that in all the circumstances of this case an injunction should be granted, and in the exercise of my discretion I refuse an injunction.

Judgment for the defendants with costs, including costs of applications for interlocutory injunctions.

Solicitors: *Town Clerk, Manchester; Julian S. Goldstone & Co., Manchester.*

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[17] [1900] 1 Q.B. 78; 16 T.L.R. 30.

SLEAFER *v.* LAMBETH BOROUGH COUNCIL.

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1959
June 30;
July 1, 2.

Morris, Ormerod and Willmer L.JJ.

[X 1957 S. No. 2170.]

Landlord and Tenant — Repairs — Weekly tenancy — Implied term — Express conditions of tenancy restricting tenant from doing work to demised premises without consent and reserving to landlords right to enter and do repairs — Tenant required to deliver up premises in good and tenantable repair—Practice of council to do repairs—Tenant of council flat injured by defect in demised premises —Whether term to be implied that landlords must keep premises *fit for human habitation—Whether any duty in landlords independent of contract to guard against foreseeable dangers from defect in demised premises of which they have notice.*

Contract—Implied term—Landlord and tenant.

The printed conditions of a weekly tenancy of a borough council flat required, inter alia, that the tenant should "reside in the "dwelling," and that he should at the end of the tenancy deliver up the dwelling in good and tenantable repair and condition. By clause 9: "The tenant shall not do nor allow to be done any "decorative or other work to any part of the dwelling without "consent in writing. . . ." By clause 11 the council was to be at liberty to enter the dwelling to inspect the state of repair and execute repairs therein. No express term in the agreement placed on either party liability for repairs, but it was the practice of the council to do all the repairs, within certain limits.

On November 30, 1955, the tenant was leaving his flat by the front door when, owing to a long-standing defect in the door which caused it to jam, he had to use force to close it by pulling on the only external handle, the letter-box knocker. The knocker came off and he fell backwards against an iron balustrade and suffered injury to his back.

The tenant brought an action against the council claiming damages, first, for breach of contract, contending that having regard to the express terms of the agreement, there must be implied a term that the landlords would make and keep the demised premises in all respects reasonably fit for habitation; and secondly, for breach of duty in that, having had notice of the defect in the demised premises, the landlords had allowed it to continue in that condition to the possible danger of the user. It was found by the trial judge that notice of the defect had been given:—

Held, that there was here no breach of duty by the landlords either under or independently of the contract. Nothing in the express terms of this contract required that as a matter of business efficacy there should be implied a term, contrary to the general law of landlord and tenant, obligating the landlords to keep the demised premises in a fit state for human habitation. The express terms, and in particular the prohibition on the tenant doing repairs without consent, were explicable on other grounds in the context of this agreement and could not by implication make the landlords liable to do repairs.

Observations of Somervell L.J. in *Mint* v. *Good* [1951] 1 K.B. 517, 521; 66 T.L.R. (Pt. 2) 1110; [1950] 2 All E.R. 1159 explained and distinguished.

Nor was there independent of the contract any breach of duty, for there is no general duty, apart from contract, on a landlord to guard against reasonably foreseeable dangers arising from a defect on demised premises of which he has notice.

Quaere, whether even if such a term could be implied in this contract a trivial defect in a door would render premises unfit for habitation or whether the damage to the tenant could reasonably have been foreseen.

Decision of Glyn-Jones J. affirmed.

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APPEAL and cross-appeal from Glyn-Jones J.

In December, 1952, the plaintiff, Albert Edward Sleafer, became tenant of a council flat on the first floor of a block of flats recently erected for the Borough of Lambeth. An agreement, dated November 28, 1952, and signed by the plaintiff, provided as follows: "The council of the Metropolitan Borough "of Lambeth, acting by their director of housing, hereby agree "to let, and I Albert Edward Sleafer do hereby agree to take "on a weekly tenancy, from Monday, the first day of December, "1952, tenement No. 5, Martin House on the Wyvil Estate in "the Metropolitan Borough of Lambeth, at a rent of £2 1s. 2d. "or such lesser sum as may be payable from time to time under "or by virtue of the council's rebate scheme which is incor"porated in this agreement, payable weekly in advance, and "subject to the conditions of tenancy printed overleaf. The "above rental includes 7s. 4d. per week hot water service charge. ". . . Tenants must read and shall be deemed to have read the "conditions of tenancy."

The general conditions of the contract of tenancy included the following: Clause 2: "The tenant is required to reside in the "dwelling which is to be used as a private dwelling only. The "tenant shall not use the dwelling as a shop or workshop or "expose any goods or materials for sale, exchange or hire there"in. No permanent notices may be exhibited on the premises." Clause 5: "The tenant shall repay to the council the cost of "repairing any damage done to the dwelling or to the fixtures "or fittings. The tenant shall not make any alterations to the "internal arrangements or external appearance of the dwelling. "The tenant must pay the cost of replacing any windows broken "during his tenancy, and the cost of replacing keys lost." Clause 7: "The tenant shall give immediate notice to the "director of housing or his representative of any stoppage in "the soil, waste or drain pipes. The placing in W.C. of rags, "cotton, bottle or anything likely to choke the drain is strictly "prohibited. Any expense caused by infringement of this regu"lation will be charged against the tenant." Clause 9: "The "tenant shall not do or allow to be done any decorative or other "work to any part of the dwelling without consent in writing. "Nails on no account are to be driven into the walls, floors, "or any part of the dwelling." Clause 11: "The council shall "be at liberty on production of a written authority under the "hand of the town clerk or other authorised officer by its agents "or workmen to enter the dwelling to inspect the state of repair "and to execute repairs therein, or for any other purpose, at "all reasonable hours of the day." Clause 15: "The tenant "shall deliver up the dwelling at the end of the tenancy together "with all landlords' fixtures in good and tenantable repair and "condition (subject to fair wear and tear) and with all locks, "keys and fastenings complete."

The plaintiff went into and remained in occupation. In the early part of 1955 he did some decorative work himself to the external door and casement frames. The housing superintendent noticed that the work had been done and informed her superior in these terms: "Mr. Sleafer, the tenant of this flat, has "decorated the external door and casement frames. This has "been done to match existing colours, and quite nicely. If you "consider that no further action should be taken, perhaps you "will write an appropriate letter to forestall any more fancy "ideas." The director of housing thereupon wrote to the plaintiff on February 19: "My attention has been drawn to the fact "that you have painted the external woodwork of the above "flat. I must draw your attention to the conditions of agree-"ment, in which it states that tenants must not carry out "decorations. If you require to carry out further decorations, "it will be necessary for you to apply for permission. You will "appreciate that this is necessary in order to maintain a good "standard of decorations on the estate."

When the plaintiff painted his front door, he had to remove the postal plate, a fitting affixed to the outside of the door having one part that could be pushed inwards to admit letters. On the outside was a knocker in the form of a handle. The postal plate was affixed on the outside of the door by two bolts which went through the door, and it would be possible, if anyone did not adjust the postal plate properly, to leave it so that the handle was not securely held in the rings or lugs on the outside.

The plaintiff was disturbed by the fact that his front door used to jam so that it became very difficult to close. It caught at the bottom part and against the upright, owing, it was said, to the fact that the door was defective because it had dropped a little so as to cause it to bind on the threshold or the weather plate fixed inside the threshold.

On November 30, 1955, the plaintiff and a visitor left the flat at about half past nine. The plaintiff tried to close the front door but it jammed, and he had to pull it quite hard two or three times. Still it did not close and he pulled somewhat harder; and when he did that, the handle or knocker came away in his hand, because one of the rings which held it broke, when more than usual force had to be applied. In the result he was caused to go backwards, fell rather heavily against an iron balustrade opposite his front door, and suffered injuries, though they were not very apparent at first. Later on, the rent collector, when he called, noticed that the knocker of the door was missing.

On April 20, 1956, a letter was written to the council on behalf of the plaintiff suggesting that the council was liable in law for the plaintiff's injuries. The council denied responsibility.

The plaintiff thereupon brought an action against the council claiming damages, first, for breach of contract, in that they were under an obligation to do the repairs arising as an implied term from the conditions of tenancy under which the landlords prohibited the tenant doing repairs without permission and reserved to themselves the right to do repairs and the right to enter the premises to inspect the state of repairs and execute repairs therein; and secondly, for breach of duty to take reasonable care to prevent damage from want of repair towards every person, including the plaintiff, lawfully on the premises.

At the trial of the action a rent collector employed by the council gave evidence that it was the practice of the council to do all repairs thought to be necessary, within certain limits, and went on to explain that in the case of such items as broken windows there would be a special position.

The plaintiff in his evidence stated that he had complained of the state of the door to a representative of the council who had thereupon taken a hammer to deal with the weather plate; that thereafter the door was somewhat better; but that the trouble recurred. His wife said that further complaints had been made, first to somebody who had called for the rent and then at the rent collecting office. The landlords' witnesses said that no complaint had been made.

Glyn-Jones J., while accepting that the witnesses called on behalf of the council were truthful, decided that either owing to faulty recollection or for some other reason they were in error, and found that notice had been given to the council.

The judge, in his judgment on June 28, 1958, came to the following conclusions: first, that the door was defective, namely,

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that it closed only with difficulty after overcoming the resistance caused by quite considerable jamming; secondly, that the defects in the door had been made known by the plaintiff or his wife to the council some time before November 30, 1955; thirdly, that it was quite reasonable to try to close the door by using the knocker or handle; and fourthly, that the plaintiff had suffered his injuries in the way that he described, namely, because the knocker came off and so caused him to fall backwards.

The judge held, however, that there could not be implied into the contract between the tenant and the council such a term as would render them liable for breach of contract; and he gave judgment for the council.

The tenant appealed. The council cross-appealed, inter alia, against the judge's finding that the council had had notice of the defect in the door, but in the event the cross-appeal was not heard.

F. W. Beney Q.C. and *Douglas Lowe* for the tenant. First, having regard to the express terms of this contract and in particular those which prohibit the tenant from doing any repair without consent and give the landlords control, by reserving to them the right to enter and do repairs in the demised premises, there arises by necessary implication a contractual term that the landlords, having had notice of the defect in a part of the demised premises necessary for their use and enjoyment, were under an obligation to the tenant to repair it; and their failure to do so is a breach of contract. The point is devoid of authority, possibly because letting flats to working-class people is comparatively modern; but there is some guidance in the authorities and support in the dictum of Somervell L.J. in *Mint* v. *Good*,[1] a case concerned with nuisance causing injury to a passer-by on the highway, in which it was not necessary to decide whether the landlord had the duty to repair, but in which Somervell L.J. expressed the view that in the case of a weekly tenancy entered into without formality "both sides must contemplate as the basis of the "contract that the house will be kept in reasonable and habitable "condition" and that "that will be done by the landlord and "not by the tenant."

If the defect had been in some part of the premises outside the demise it is beyond question that the landlord would be responsible: see *Miller* v. *Hancock*,[2] where a term was held to be implied vis-à-vis a stranger that the landlord would keep a staircase in repair; and though the decision as to the duty to a stranger was disapproved by the House of Lords in *Fairman* v. *Perpetual Investment Building Society*,[3] the reasoning, namely, that an obligation on the landlord to keep premises safe for the use of tenants may reasonably be implied, was not overruled. [*Devine* v. *London Housing Society*[4]; *Hargroves, Aronson & Co.* v. *Hartopp*[5]; *Huggett* v. *Miers*[6]; *Lucy* v. *Bawden*,[7] and *Cockburn* v. *Smith*[8] were also referred to.] In *Dunster* v. *Hollis*[9] Lush J. held that where a landlord who let rooms retained control over the steps, his obligation to the tenant was to keep the steps reasonably safe. *Heap* v. *Ind Coope and Allsopp Ltd.*[10] is also helpful as showing that the right of the landlord to enter the demised premises was sufficient to put him under a duty to third persons if he had notice of a defect.

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[1] [1951] 1 K.B. 517, 521–522; 66 T.L.R. (Pt. 2) 1110; [1950] 2 All E.R. 1159.

Though some of the cases cited deal with implied terms relating to something outside the demise but under the control of the landlord, whereas the door in question here is part of the demise, that distinction does not negative the tenant's claim; nothing in the express terms of this contract is inconsistent with the implied term contended for, and the landlords have expressly retained control over the repairs and have prohibited the tenant from doing them. The words "without consent" in clause 9 do not make it any less prohibitive, for they are unqualified, and the landlords could withhold consent if they pleased.

[MORRIS L.J. You are asking us to make new law.]

A decision in favour of this submission would only apply to weekly tenancies where the tenant is precluded from doing repairs.

Secondly, the tenant has a claim independent of the contract in that the landlords, knowing the condition of this door, failed in their common law duty to take steps to prevent an accident of this kind happening. It is not necessary to show that they ought reasonably to have foreseen exactly the injury which did occur. The judge found that the natural way for this tenant to shut his door was by doing what he did. [*Victoria Laundry*

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[2] [1893] 2 Q.B. 177.

[3] [1923] A.C. 74; 39 T.L.R. 54.

[4] [1950] W.N. 550; 66 T.L.R. (Pt. 2) 1012; [1950] 2 All E.R. 1173.

[5] [1905] 1 K.B. 472; 21 T.L.R. 226.

[6] [1908] 2 K.B. 278; 24 T.L.R. 582.

[7] [1914] 2 K.B. 318; 30 T.L.R. 321.

[8] [1924] 2 K.B. 119; 40 T.L.R. 476.

[9] [1918] 2 K.B. 795.

[10] [1940] 2 K.B. 476; 56 T.L.R. 948; [1940] 3 All E.R. 634.

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(*Windsor*) *Ltd.* v. *Newman Industries Ltd.*, *Coulson & Co. Ltd.* (*Third Parties*)[11] and *Thurogood* v. *Van Den Berghs and Jurgens Ltd.*[12] were referred to.]

[WILLMER L.J. How does the tenant become a person to whom the duty is owed unless you invoke the contract? Is it not breach of contract or nothing?]

The duty not to commit tortious acts vis-à-vis the tenant may exist alongside the contractual duty as soon as the tenant shows that he is a person who has a right to be on the premises. The landlord has to avoid that which may injure his neighbour, who is here the tenant. He may limit his duty by the terms of the contract, but if the contract does not so limit his common law duty, that duty remains. In *Greene* v. *Chelsea Borough Council*[13] this court held that the council was under a duty of care to a licensee of requisitioned premises, and Denning L.J. said that the duty arose not out of contract but because the council were in control of the house for the purpose of repairs and that that control imposed on them a duty to everyone lawfully on the premises. It would be odd if that licensee were in a better position than this tenant, particularly when the evidence shows that here the practice of the council, known to all the tenants, was to do all the repairs, with certain irrelevant exceptions.

Stephen Chapman Q.C., *Peter Rawlinson Q.C.* and *Graem Williams* for the council. As between landlord and tenant the duties and obligations in relation to the demised premises depend on the terms of the contract between them save in so far as common law or statute impose obligations by virtue of their relationship. The argument that at common law an obligation rests on the landlord is 291 years too late. In *Pomfret* v. *Ricroft*,[14] the first of a long line of cases in which it was sought to impose obligations on landlords at common law, the demise included the use of a pump, and it was held that no action lay, since there was no duty or implied term in the contract that the pump should be kept in repair by the landlord.

[MORRIS L.J. But there was no demise of the pump. I wonder whether that case would be decided in the same way today?]

There was a demise of user, namely, of an easement; such a demise does not import any obligation as to the fitness of the easement. The common law places no obligation for repair on a landlord as such, though the Housing Act, 1936, has altered that by importing into contracts between landlord and tenant an implied term in relation to certain classes of house; but that Act does not apply here. Nor does a landlord who lets unfurnished premises enter into any warranty that they are fit for any purpose at all. In *Sutton* v. *Temple*[15] the tenant's beasts died as a result of poisoned land, but the landlord was held not liable and the tenant was held liable to pay the full rent.

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[11] [1949] 2 K.B. 528, 540; 65 T.L.R. 274; [1949] 1 All E.R. 997.

[12] [1951] 2 K.B. 537; [1951] 1 T.L.R. 557; [1951] 1 All E.R. 682.

[13] [1954] 2 Q.B. 127, 138; [1954] 3 W.L.R. 12; [1954] 2 All E.R. 318.

[14] (1668) 1 Wms.Saund. 321n.

[MORRIS L.J. That is a puzzling decision.]

It is basic to the law of landlord and tenant that the tenant takes the property as he finds it. In *Hart* v. *Windsor*[16] it was held that there was no implied warranty on the lease of a house or land that it should be reasonably fit for particular use or habitation. That was followed by Maugham J. in *Cruse* v. *Mount*[17] in relation to the letting of an unfurnished flat. [Reference was also made to *Robbins* v. *Jones*[18]; *Lane* v. *Cox*[19]; *Cockburn* v. *Smith*[20] and *Cavalier* v. *Pope*.[21]]

The only common law obligation arising independently of the contract is that imposed on a tenant in respect of waste.

The question whether an implied term arises on this particular contract has to be viewed against the background of the settled law contained in those submissions.

[ORMEROD L.J. No one disputes the proposition that if there is a letting with no conditions on either side there is no implied obligation on the landlord to repair. But it does not follow that if a contract contains certain terms one cannot spell out of that contract an implied obligation to do something.]

That is conceded; but this formal contract is silent as to any obligation on the landlords to do repairs, and the strong prima facie inference must be that they do not intend to make themselves responsible for them. Clause 11 merely reserves to the landlords the right to enter and do repairs; it does not oblige them to do repairs.

[WILLMER L.J. These are the council's conditions and must be construed contra proferentes. Surely clause 2 requiring the tenant to "reside in the dwelling" might give rise to an implied term that the landlords must keep the demise in such condition as will enable the tenant to do so?]

[15] (1843) 12 M. & W. 52.

[16] (1844) 12 M. & W. 68.

[17] [1933] Ch. 278; 49 T.L.R. 87.

[18] (1863) 15 C.B.N.S. 221, 240.

[19] [1897] 1 Q.B. 415; 13 T.L.R. 142.

[20] [1924] 2 K.B. 119.

[21] [1906] A.C. 428; 22 T.L.R. 648.

Clause 2 is directed against the tenant allowing other people to take over the flat instead of using it himself as his home; similarly, clause 9 is not a prohibition against the tenant doing repairs but against the danger of enthusiastic amateurs tinkering with the flats they occupy and producing garish colour schemes offensive to their neighbours, or serious floods by inexperienced plumbing, or disastrous fires by interference with the electrical installations.

[MORRIS L.J. But ought not a tenant to know where he stands in relation to repairs? There is evidence that the council in practice does the repairs; but what is the tenant to infer from these conditions?]

Even lawyers find some difficulty in knowing what some contracts mean.

[MORRIS L.J. But is it not unsatisfactory to say that this tenant should have gone to a solicitor to find out what his contract means. It would be easy for the council to put in a clause saying that they did not bind themselves to do any repair other than to keep the main structure in condition.]

It might be easy, but in practice if a clause is put in which is not strictly necessary it often causes trouble. This contract made it quite plain that the council was assuming no obligation as to repairs; if the tenant wanted to do any work, he was at liberty to do so provided he got consent, and it might well be implied that consent would not be unreasonably withheld.

The cases cited from *Miller* v. *Hancock*[22] onwards do not assist here, since they dealt with something which was not part of the demised premises. *Mint* v. *Good*[23] is distinguishable as a decision on the entirely different question of the liability of a landlord for nuisance on a public highway. *Wilchick* v. *Marks and Silverstone*[24] and *Heap* v. *Ind Coope & Co. Ltd.*[25] decided that an express reservation to the landlord of a right to enter and do repairs involved a control of the premises sufficient to make the landlord liable in nuisance to users of the highway. In *Mint* v. *Good*[26] the court concluded that there might be implied a reservation to the landlord of the right to enter and observe the state of repair of his property in the case of a weekly tenancy entered into without formality so as to involve the landlord in the same liability in nuisance.

[22] [1893] 2 Q.B. 177.

[23] [1951] 1 K.B. 517, 521–522.

[24] [1934] 2 K.B. 56; 50 T.L.R. 281.

[25] [1940] 2 K.B. 476.

[26] [1951] 1 K.B. 517, 521–522.

On the claim based in tort, no duty can arise in this case independently of the contract, and the submission that if the landlords have notice of some defect in the demised premises and leave it unrepaired they are under some duty to the tenant to put it right is wholly untenable. There is no duty owed to all the world in respect of a defect on demised premises. Moreover, even if there were such a duty here, independent of the contract, this accident was not reasonably foreseeable. All that the council knew—if the judge's finding is upheld on this point—was that the door stuck. That was a trivial matter and the accident which happened was wholly unforeseeable.

Beney Q.C. in reply. The fact that these tenants know that when anything goes wrong the council will put it right points to an obligation on the landlords to do this repair, though it may not be conclusive. This tenant certainly expected the council to repair the door and indeed asked them to do it.

[WILLMER L.J. Would you claim that the landlords' obligation is to do all repairs of every kind?]

No; only such as are reasonably necessary to make the place reasonably fit for habitation.

On the alternative claim in tort, it is not correct that there can be no duty outside the contract. There was here a breach of duty owed to a person reasonably expected to encounter the danger. On the sixth proposition of Asquith L.J. in the *Victoria Laundry* case [27] it was " on the cards " that injury to this tenant might result from the landlords' failure to repair the door. There are many cases which show that it is possible to find a breach of duty on exactly the same facts as give rise to a claim for breach of contract: see *Matthews* v. *Kuwait Bechtel Corporation.*[28] On the assumption that this contract puts no responsibility on either party to do anything, then on these facts the landlords, having knowledge of the defect in this door in the demised premises and having failed to do the repair, are liable.

MORRIS L.J. read the terms of the agreement of November 28, 1952, and said that the court had been told that nothing in the rent rebate scheme, incorporated in the contract, was relevant for present purposes. His Lordship read the material clauses of the conditions of tenancy and continued:

It may be said, I think, with justification, that the conditions as drawn do not very clearly explain to anyone reading them how the matter of doing repairs stands between landlord and tenant. The evidence before the judge showed that, in practice, the repairs were done by the landlords. [His Lordship referred to the evidence given by the council's rent collector on the practice as to repairs, stated the further facts, commented that on the photographs before the judge and the court it seemed that the reasonable and appropriate method of pulling the front door to when outside would be to take hold of the knocker and to use it to close the door, stated the conclusions of the judge, and continued:]

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[27] [1949] 2 K.B. 528, 540.

[28] [1959] 2 Q.B. 57; [1959] 2 W.L.R. 702; [1959] 2 All E.R. 345.

The landlords on this appeal served a notice saying that they would, if necessary, contend that the finding by the judge, in favour of the plaintiff, that notice of the alleged defect in the door was communicated to the council was against the weight of evidence. Mr. Rawlinson, following Mr. Chapman, was prepared to argue that point and to deal with the evidence in regard to it, but we intimated that we thought that it would be convenient in the first place to deal with the legal issues that arise, and, as a result, we have not investigated that separate matter raised by the council.

Mr. Beney, for the plaintiff, submitted that there was to be implied in the contract of tenancy a term which would make the landlords liable. In his reply, Mr. Beney somewhat modified the term that he originally submitted should be implied. He first submitted that if a part of the demised premises or access thereto, the use of which was necessary for the plaintiff, could not reasonably be used by him unless it was kept in repair, and if the right to repair it was solely in the lessors, there was an implied contractual term that it could be repaired by the lessors, providing that they knew of or had adequate notice of the necessity for such repair. Mr. Beney somewhat simplified that contention, for he submitted that on the facts of this case it was to be implied that the landlords should make the premises in all respects reasonably fit for human habitation. If there was an implied term to that effect, it would be necessary for Mr. Beney to assert that if a door jams and can only be closed with difficulty, a house is not reasonably fit for human habitation. Mr. Beney further submitted that, apart from the implication of a term, there was a duty in the landlords, in all the circumstances, to effect repairs.

It is common ground that there is no question of the application of any statutory provisions. Mr. Beney in his interesting argument cited a number of cases dealing with the obligations that may lie on landlords in certain circumstances. He referred first to *Miller* v. *Hancock*,[1] and later made a submission as to the extent to which that case still survives. He referred us to such cases as *Hargroves, Aronson & Co.* v. *Hartopp*,[2] *Huggett* v. *Miers*,[3] *Lucy* v. *Bawden*,[4] *Dunster* v. *Hollis*,[5] and *Cockburn* v. *Smith*,[6] and to several other cases.

If a landlord lets a flat and retains the staircase which gives access to it, questions may arise as to the obligations cast on the landlord. If a landlord lets a flat and retains possession of the premises above the flat, questions may arise as to his obligations if rainwater is allowed to go into the flat. But it seems to me that such questions do not arise in the present case. In the present case the door was clearly part of the demised premises.

In regard to the general law concerning premises let on lease, we were referred by Mr. Chapman to several cases, including *Hart* v. *Windsor*,[7] in which Parke B. said [8]: "It appears, "therefore, to us to be clear upon the old authorities that there "is no implied warranty on a lease of a house, or of land, "that it is or shall be reasonably fit for habitation or cultivation. "The implied contract relates only to the estate, not to the "condition of the property."

In *Cockburn* v. *Smith* [9] Bankes L.J. said: "I want to make "it plain at the outset that this is not a letting of the whole "house, where, without an express covenant or a statutory "obligation to repair, the landlords would clearly be under no "liability to repair any part of the demised premises whether "the required repairs were structural or internal and whether "they had or had not notice of the want of repair."

Mr. Beney's submission depends, however, on the actual conditions in this contract. He referred to clauses 9 and 15 in particular, though he relied on other clauses as well, notably clause 2. Clause 2, I think, is primarily designed to ensure that a person may not take a flat at a time when there is a housing shortage unless he is personally genuinely desirous of occupying it.

Mr. Beney submitted that clause 9 contains a prohibition against a tenant of the flat doing any decorative or other work

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[1] [1893] 2 Q.B. 177.

[2] [1905] 1 K.B. 472; 21 T.L.R. 226.

[3] [1908] 2 K.B. 278; 24 T.L.R. 582.

[4] [1914] 2 K.B. 318; 30 T.L.R. 321.

[5] [1918] 2 K.B. 795.

[6] [1924] 2 K.B. 119; 40 T.L.R. 476.

[7] (1844) 12 M. & W. 68.

[8] Ibid. 86.

[9] [1924] 2 K.B. 119, 128.

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in the flat. He read that clause in conjunction with clause 15. He submitted that because of the existence of those two clauses and because (as he submitted) clause 9 prohibits a tenant from doing repairs, there is in the circumstances of this case—and he so limited the matter—an implied term that the landlords will make the flat in all respects reasonably fit for human habitation. It does not seem to me that clause 9 does contain a prohibition against the tenant doing repairs. It seems to me that Mr. Chapman is correct when he submits that the real purpose of clause 9 is to ensure that there will not be haphazard conditions in premises of this kind. It might not be, for example, at all appropriate if a number of front doors were all painted in different colours which might make the appearance unsightly. It would be unfortunate also if the work was badly done and if defects were obscured and covered up.

I read clause 9 as being designed to keep control over the work done by a tenant and not as being a prohibition. I have no doubt that in fact, and in practice, the borough council intended to do the necessary repairs, but the question arises whether they had obliged themselves to do such repairs. I can find nothing in these conditions which shows that the borough council had obligated themselves to do repairs.

The question then arises whether it is necessary in order to give this contract business efficacy to imply the term for which Mr. Beney contended. In my view, it is certainly not necessary. If it had been desired to have any such term, it could have been made the subject of an express term.

Mr. Beney relied strongly on something said by Somervell L.J. in this court in *Mint* v. *Good.*[10] The question which there arose was in reference to liability for a nuisance on premises to a passer-by on the highway. There is no need to refer to the law on that subject; but what was said by Somervell L.J. in that case was said in reference to the circumstances under which a landlord, as opposed to an occupier, would be liable for nuisance. The first part of the headnote very helpfully states the point decided: "The principle that a landlord, who has expressly "reserved the right to enter the demised premises and do repairs, "is liable in nuisance for injuries caused by the defective state "of the premises to a person passing along the highway on which "they abut, applies to cases where the landlord has impliedly "reserved that right; and a term to that effect is normally to be

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[10] [1951] 1 K.B. 517; 66 T.L.R. (Pt. 2) 1110; [1950] 2 All E.R. 1159.

"implied in the contract of tenancy when the premises are let "on a weekly tenancy." In stating his reasons for the conclusion to which I have referred, Somervell L.J. said [11]: "It seems "to me that the same principle must apply if a landlord has "impliedly reserved to himself the same right. I cannot see "any principle by which a landlord should be in one position in "the case of an express reservation, and in a different position "in the case of an implied reservation. The question, therefore, "would be whether, in the circumstances as stated, a right to "enter on and view the premises and do necessary repairs is to "be implied. I would have said that, in the absence of evidence "which excluded it, there is no term which would be more easily "and more necessarily implied by law in a tenancy of this kind "than a right in the landlord to enter, or to re-enter, to examine "the premises and to do necessary repairs. It must be in the "contemplation of both parties to such a weekly tenancy that "the tenant will not be called upon to do repairs. The Rent "Restriction Acts have rather altered the position; but in the "old days it would have been absurd for either side to contemplate that a man who was only a weekly tenant should be "called upon to do repairs. Both sides, I think, must contemplate as the basis of the contract that the house will be kept in "reasonable and habitable condition; that that will be done by "the landlord and not by the tenant; and, although he does not "bind himself to do so, that he will have the right to enter and "look after his own property by doing repairs."

Mr. Beney took comfort from those words because he said they support his submission that the landlord in a case of this kind has obligated himself to do repairs. Mr. Beney pointed particularly to the phrase "the basis of the contract" and submitted that Somervell L.J. was suggesting by the use of those words that it was the basis of the contract that the landlord would oblige himself to do the repairs. With every respect to Mr. Beney's argument, I do not take that view of those words. I think that those words merely mean that the parties contemplated that in fact and in practice the landlord would do the repairs, but I think that Somervell L.J. was making it clear that there must be that expectation, although the landlord was not bound to do the repairs. The words "although he does not "bind himself to do so" seem to me to point irresistibly to that view of Somervell L.J.'s words.

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[11] [1951] 1 K.B. 517, 521.

In the present case the council expected to do repairs but were rather careful to avoid in this weekly contract making themselves bound to do the repairs.

For these reasons, I, for my part, have found it quite impossible to read into this contract the term for which Mr. Beney so powerfully contended. It is not necessary to do so in order to give efficacy to this contract.

Secondly, Mr. Beney submitted that, independently of contract, there was a duty that arose in all the circumstances, one of which he submitted was that the landlords were given notice of certain defects. The landlords wished to challenge the judge's finding of fact on that matter. I find it impossible to say that any duty can be formulated other than such as is to be found in the contractual position. Of course, the landlord must not vis-à-vis his tenant commit any tort, but it seems to me that the obligations of the landlord must be found in the contract or in any additional term which must necessarily be implied in the contract.

I ought to add that the point was taken by Mr. Chapman that, even if he were wrong in regard to the contractual obligations of the landlords, no damages could be claimed in this case, or no damages other than nominal damages, because the defect in the premises was not of such a nature as to make it reasonably foreseeable that an injury of the kind which the plaintiff suffered would result from the breach. I do not find it necessary to develop this point because I do not think it necessary to decide it.

We were referred to the very helpful statement of the law by Asquith L.J. in *Victoria Laundry (Windsor) Ltd.* v. *Newman Industries Ltd., Coulson & Co. Ltd. (Third Parties)*.[12] Asquith L.J. formulated the proposition in these terms: "In cases of "breach of contract, the aggrieved party is only entitled to "recover such part of the loss actually resulting as was at the "time of the contract reasonably foreseeable as liable to result "from the breach." Mr. Chapman submitted that the loss here was not reasonably foreseeable. In answer to that point, Mr. Beney referred to the sixth proposition of Asquith L.J.[13]: "Nor, "finally, to make a particular loss recoverable, need it be proved "that upon a given state of knowledge the defendant could, as "a reasonable man, foresee that a breach must necessarily result

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[12] [1949] 2 K.B. 528, 539; 65 T.L.R. 274; [1949] 1 All E.R. 997.

[13] [1949] 2 K.B. 528, 540.

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" in that loss. It is enough if he could foresee it was likely so " to result. It is indeed enough, to borrow from the language " of Lord du Parcq, in the same case " [*Monarch Steamship Co. Ltd.* v. *Karlshamns Oljefabriker (A/B)*] " at page 234,[14] if " the loss (or some other factor without which it would not " have occurred) is a 'serious possibility' or a 'real danger.' " For short, we have used the word 'liable' to result. Possibly " the colloquialism 'on the cards' indicates the shade of " meaning with some approach to accuracy." Had this point arisen for direct decision, Mr. Beney would have submitted that it was " on the cards " that injury to the tenant might result from a breach of the landlords' suggested obligation. I, for my part, do not find it necessary to decide that question.

For the reasons that I have given, I have reached the conclusion that the judge was correct in dismissing the action. It was a most unfortunate mischance and no one can fail to be sorry for the plaintiff. But I am not persuaded that liability in law attaches to the landlords.

ORMEROD L.J. I agree that this appeal should be dismissed. It is not in issue that, so far as an ordinary tenancy is concerned, where the question of repairs is not raised in the tenancy agreement, there is no obligation on the landlord to keep the premises in repair.

In this case it is clear that the terms of the tenancy agreement contain no express provision by the landlords that they will do the repairs required in this case, or, indeed, any repairs to the property in question. It is not for this court to comment on the form of this tenancy agreement, but it may be that it would be a useful thing from the point of view of the tenant if the position were put a little more clearly than in fact it is.

The contention of the landlords is that they are under no obligation to repair and that the tenancy agreement contains no provision which obliges them either expressly or by implication to make any repairs. It has appeared in the course of the case that it would have been a very simple matter for the landlords to resolve all doubt by making it an express term of the contract that they were under no obligation to do any repairs; but that has not been done, and it is for this court to construe the agreement as it is.

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[14] [1949] A.C. 196, 234.

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The submission of Mr. Beney is that, although there is no express term here which would put the landlords under an obligation to do repairs, one should be implied by reason of the conditions of the tenancy which are contained in the agreement. It was argued, both in the court below and in this court, that it was a necessary implication of the terms of the tenancy that there should be at least an implied obligation on the landlords not necessarily to do all repairs, but, as Mr. Beney put it, in all respects to keep the premises reasonably fit for human habitation.

When this matter was argued before the judge it was contended by counsel for the defendants that in no circumstances could a condition be implied that the landlords should be under an obligation to repair. The judge dealt with that in this way: "Although I cannot follow Mr. Lowe in saying that the mere "fact that the landlord has reserved the right to do repairs "means that there is imposed on him an obligation, I cannot "agree with Mr. Rawlinson when he says to me that the absence "of some express term in the tenancy, whether oral or in writing, "means that there can never arise a contractual duty on the "landlord to do the repairs—in other words, that such term can "never be implied. I am not sure that that is right; I am not "prepared to say that circumstances may not arise in which a "court could find itself impelled to imply such terms in a tenancy "agreement." Without having, of course, to decide that question, as at present advised, I should certainly agree with the judge. A tenancy agreement, like any other agreement, must be read as a whole, and it may very well be that in construing the agreement it is possible to imply an obligation on the landlord to do repairs. But the question which the judge had to decide and which this court has to decide was whether in this particular agreement such an obligation could be implied. The judge went on: "I have examined as fully and as carefully as I "can the circumstances of this case to see whether it would be "right to imply such a term into this tenancy agreement, and "I have come to the conclusion that it would be wrong. It is "true that the borough council owns and lets a large number of "dwellings; it is true that the tenants who take a tenancy of any "one of these dwellings of the borough council may justly say "that they are aware that the corporation does in fact do the "repairs; but that amounts, I think, to no more than an expecta-"tion or hope on the part of the tenant that if the place needs "repair the borough council will repair it."

It does appear from the evidence that the practice has been for the council to do the repairs, and it may very well be in the course of time that this particular fault in the front door of this flat will be remedied by the council, although in fact it had not been done before this unfortunate accident occurred.

Mr. Beney submits that, taking into account particularly clauses 9, 11 and 15 of the terms of the tenancy, there should be implied such an obligation on the part of the landlords to do the repairs. The one on which he relies particularly is clause 9, which provides: "The tenant shall not do or allow to be done "any decorative or other work to any part of the dwelling "without consent in writing. Nails on no account are to be "driven into the walls, floors, or any part of the dwelling." Mr. Beney agreed that if that condition were not included he would not be able to ask this court to imply the term which he thinks should be implied; and he agrees, too, that he can only ask the court to imply this term if the effect of clause 9 is that it is a prohibition on the tenant not to do any repairs at all. For my part, I agree with my Lord that this condition does not import a prohibition on the tenant. It certainly imposes a restriction in that it will not allow him to do repairs without the consent of the landlords; but that is a very different thing from saying that the repairs shall not be done. The mere fact that the condition says that the repairs shall not be done without the consent of the landlords, I would have thought, contemplated that in certain circumstances the tenant would be allowed to do repairs.

I take the view, which has been taken by my Lord, that this clause does not amount to a prohibition but is merely a restriction, and, if that be so, then I think Mr. Beney's argument fails.

In these circumstances, without going into the numerous authorities which have been cited by Mr. Beney in his very careful and detailed argument, I would say that on that point this appeal must fail and should be dismissed.

The further point raised by Mr. Beney that there is a duty on the landlords apart from contract is one on which I would wish to add nothing to what has been said by my Lord. For my part also, I cannot see how in this case any duty can arise on the landlords independently of the duties, if any, which may be imposed on them by the terms of the tenancy. Therefore, without saying anything further, I agree that the appeal should be dismissed.

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Willmer L.J. I also have reached the conclusion that this appeal fails. The plaintiff's case is that the landlords, the Lambeth Borough Council, were in breach of their duty by failing to keep his front door in proper repair, as a result of which the accident occurred in the way described. The case is put forward both on the basis of breach of contract and as a tort. For myself, I think it is quite impossible to say that the defendants are under any liability in tort, and for this reason: I do not see how the plaintiff can show that the defendants owed him any duty except by invoking the contract whereby he became their tenant. There can be no duty owed to all the world to keep anybody's front door in repair. The duty, if there is one in this particular case, must arise as a matter of contract.

It is well established that, in the absence of agreement to the contrary, the law imposes no obligation on a landlord to keep the demised premises in repair. I do not think any help is to be derived from the numerous cases cited to us by Mr. Beney, where the question at issue was as to the landlord's responsibility for non-repair of premises which he has retained and not demised. Here we are concerned with the non-repair of something which was demised. It is clear that the agreement between the plaintiff and the defendants contained no express stipulation with regard to liability for repair of the demised premises. The question, therefore, arises whether any obligation on the part of the landlords to execute repairs and, in particular, repairs to this front door, can be implied.

I am bound to say that, if the tenants of the Lambeth Borough Council feel in a state of bewilderment as to what their rights and obligations are when they have finished reading these conditions of tenancy, I can well understand their difficulty. These are, however, the conditions which the borough council has thought fit to impose on its tenants, and we must do our best to construe them. It is conceded on their behalf that the conditions must be construed contra proferentes. Mr. Beney has contended, particularly having regard to the express provisions of clauses 2, 5, 9 and 15, that an obligation is to be implied against the defendants to repair these premises at least to the extent of rendering them reasonably fit for human habitation. He suggests that in this connection the same test as would be applied under section 2 of the Housing Act, 1936, if that were applicable, should be applied here, having regard to the provisions of this particular agreement. He concedes, however, that there must be some limitation to the implied obligation to do repairs, and that it is not every repair which would come within the duty of the council. For myself, without wishing to express any concluded view, I have a great deal of sympathy for the general proposition put forward by Mr. Beney. I think there is much to be said for the view that clause 2 of the agreement, which requires the tenant to reside in the dwelling-house, does by implication require the landlords to do such repairs as may make it possible for the tenant to carry out that obligation. At least it seems to me that that is a possible view. But if that view be right, the obligation would not, in my judgment, extend to cover the type of repairs which we have to consider in this case. All that was wrong in this case was that the door was faulty, partly because one of its sides was binding at the bottom against the jamb, and partly because the weather board at the foot of the door was binding on the floor underneath. As I understand it, it would be the simplest possible operation to put a door which is out of adjustment in that way into proper repair, and it could not be regarded as other than a very trivial repair.

Wherever the line is drawn, even assuming that Mr. Beney is right in saying that some obligation on the part of the council to execute repairs must be implied, that line must be drawn, I should have thought, well short of including responsibility for such a trivial repair as the unsticking of this door. Even assuming, therefore, that Mr. Beney's argument is well founded, and that by implication there must be some obligation on the part of the council to execute repairs, I would not be prepared to accede to the proposition that such an obligation would include a repair such as is in question in this case.

In those circumstances, even assuming that the council had knowledge of the defects, as was alleged—and as to that I bear in mind that we did not hear the argument of Mr. Rawlinson to the contrary—I find it impossible to say that any breach of contract has been proved against them.

I think it right that I should also add this. If I had found it possible to be satisfied that a breach of contract had been proved, I should have remained far from satisfied that the damages claimed in this case were the natural and probable consequence of any such breach of contract. I do not think that the accident sustained by the plaintiff was of a kind which could be regarded as reasonably foreseeable on the part of the council. Even if there had been a breach of contract, therefore, I should have found it difficult to come to the conclusion that the plaintiff's claim in this case could be justified. In those circumstances, I find myself in agreement with my Lords that this appeal fails.

Appeal dismissed with costs, the costs to include the costs of the motion for leave to appeal out of time.
Order as to costs not to be enforced without further order of the court.
Order for taxation in accordance with the Legal Aid scheme.

Solicitors: *Marcan & Dean; Pennington & Son.*

M. M. H.

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March 11, 12, 13, 16; *April* 29.
Lord Jenkins, Morris and Ormerod L.JJ.

ADAMS AND OTHERS v. NATIONAL BANK OF GREECE AND ATHENS S.A.

PRUDENTIAL ASSURANCE CO. LTD. AND OTHERS v. SAME.

[1956 A. N. No. 1802. 1957 P. No. 982.]

Conflict of Laws—Foreign legislation—Foreign bank liable on English debt—Legislation by foreign State merging debtor bank with another bank in State of origin—New amalgamated bank "universal "successor" to rights and liabilities of former banks—Creditors' rights vested in English law—Subsequent foreign amending legislation retrospectively excepting obligation on English debt from universal succession—Whether a law governing succession or status —Whether confiscatory or discriminatory—Right of creditor to sue new bank.

Conflict of Laws—Succession—Corporation—Retrospective foreign legislation—Conflict of Laws—Confiscatory or political legislation.

Conflict of Laws—Foreign legislation—Comity.

In 1927 a Greek mortgage bank issued sterling mortgage bonds repayable as to principal in 1957 with interest thereon meanwhile. The bonds were unconditionally guaranteed as to principal and interest by another Greek bank, and the proper law of the bonds and of the ancillary contract of guarantee was English law. In 1953 by an Act of the Government of Greece and by royal decree the guarantor bank and a third Greek bank (hitherto unconnected with the bonds) were amalgamated into a new banking company, the defendant company, and it was enacted that the new company was the "universal successor" to the rights and obligations of the amalgamated companies. In *National Bank of Greece and Athens S.A.* v. *Metliss* (infra) (proceedings instituted in December, 1955, by a bondholder claiming arrears of interest against the defendants), it was held that the English courts would give effect to that decree as transferring to the defendants the liabilities of the guarantor bank. On July 16, 1956, the Greek Government passed a legislative decree amending the law and decree of 1953 so that the defendant company, as from the time of its creation, became the universal successor to the rights and obligations of the companies amalgamated "except for the obligations to which such companies were liable "whether as principal or guarantor . . . under bonds . . . payable ". . . in gold or foreign currency, issued by limited liability com"panies." Under Greek law that decree had a retrospective effect and the defendants ceased to be liable on the obligations of the original guarantor bank in respect of the bonds.

On dates subsequent to July 16, 1956, a number of bondholders presented for payment coupons covering certain arrears of interest due under the bonds. Payment was refused by the mortgage bank and by the defendants. In an action by the bondholders against the defendants, as guarantors under the bonds, in which the defendants relied on the Greek decree of 1956 as a decree governing status which the English courts would recognise and the bondholders contended that that decree was a confiscatory or discriminatory foreign law to which English law would refuse to give effect:—

Held, (1) that the proper law of the bondholders' contract was English law, which recognised the competence of the Greek legislature to pass the decree of 1956.

(2) That the decree of 1956 did not interfere with the bondholders' contractual rights, but its effect was to vary the status and attributes applied by Greek law to the defendants, in that it terminated their liability to assume the obligations for payment of the original guarantor bank; further, the decree was neither confiscatory nor discriminatory in its scope or of the nature of a penal or revenue law or such that English public policy could demand that it be not recognised, for it affected all bondholders alike, and that, accordingly, the plaintiffs' claim failed.

National Bank of Greece and Athens S.A. v. *Metliss* [1958] A.C. 509; [1957] 3 W.L.R. 1056; [1957] 3 All E.R. 608 and *Lynch* v. *Paraguay Provisional Government* (1871) L.R. 2 P. & M. 268 considered.

Decision of Diplock J. [1958] 2 Q.B. 59; [1958] 2 W.L.R. 588; [1958] 2 All E.R. 3 reversed.

APPEALS from Diplock J.[1]

On December 1, 1927, the National Mortgage Bank of Greece issued £2,000,000 7 per cent. sterling mortgage bonds, and the National Bank of Greece unconditionally guaranteed the due payment of the principal moneys and interest and the due performance of all the conditions of the bonds. Both banks were companies incorporated under Greek law. The bonds provided that any question arising thereon should be settled by arbitration in London in accordance with the laws of England, and it was not disputed that the proper law of the bonds and of the ancillary contract of guarantee was English law. On December 1, 1935, the provisions of the bonds were modified so as to reduce the rate of interest from 7 per cent. to 4¾ per cent., which modifications were agreed to by the guarantor.

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[1] [1958] 2 Q.B. 59; [1958] 2 W.L.R. 588; [1958] 2 All E.R. 3.

On February 18, 1953, the Greek Government passed a law, Law No. 2292, which authorised the amalgamation or merger of banking companies, and provided, by section 4, that the company which absorbed another company by merger, or the new company formed by the amalgamation, "becomes the universal successor "to the rights and obligations in general of the amalgamated "companies, without any further formality or act whatsoever."

By a royal decree dated February 27, 1953, made under that law the National Bank of Greece and another Greek company, the Bank of Athens, were amalgamated and a new limited liability company, the National Bank of Greece and Athens S.A., the defendant company, was formed; by clause 5 of the decree the National Bank of Greece and the Bank of Athens ceased to exist, and the defendant company was "substituted ipso jure . . . in all "rights and obligations of the said amalgamated banks as their "universal successor." The effect of Law No. 2292 and the decree in Greek law was that the defendants succeeded to the liabilities of the National Bank of Greece S.A. as guarantor of the bonds.

In *National Bank of Greece and Athens S.A.* v. *Metliss*,[2] in which a bondholder claimed against the defendants for arrears of interest due under the bond, it was held that the English courts would recognise and give effect to the Greek Law No. 2292 and the decree as transferring to the defendants the liabilities of the former National Bank of Greece S.A., and that, accordingly, the defendants were liable to the bondholder under the contract of guarantee.

On July 16, 1956, the Greek Government passed a legislative decree, No. 3504, substituting for the relevant paragraph of article 4 of Law No. 2292 of 1953, as from the time it entered into force, a paragraph whereby the company absorbing another company by

[2] [1958] A.C. 509; [1957] 3 W.L.R. 1056; [1957] 3 All E.R. 608.

amalgamation or the new company formed by the amalgamation became the universal successor to the rights and obligations of the companies amalgamated, except for the obligations to which such companies were liable whether as principal or guarantor or otherwise under bonds, securities in general or contracts howsoever in relation to loans through bonds payable in gold or foreign currency, issued by limited liability companies; the new company formed by the amalgamation should not be or be deemed by reason of this law or other law or decree or articles of association to be the successor to the above obligations under loans in gold or foreign currency. The legislative decree also abolished paragraph 5 of the royal decree of February, 1953, and provided that the rights and obligations of the defendant company were governed as from the time of its creation by the amended provisions of Law No. 2292. In Greek law as a result of that decree the defendants were under no liability in regard to the bonds in question, and the decree was a decree to which the Greek courts would give retrospective effect.

On dates subsequent to July 16, 1956, a number of bondholders presented coupons covering interest due under the bonds since January 1, 1950, to the National Mortgage Bank of Greece for payment, and in August and September gave notice thereof to the defendants. Payment was refused by the mortgage bank and by the defendants and on September 17, 1956, and June 4, 1957, the bondholders issued the writs in these actions claiming the arrears of interest against the defendants as guarantors of the bonds. There was a third action (not referred to in the report of the hearing before Diplock J.) relating to amounts of certain principal sums which became due on December 1, 1957, and to certain arrears of interest. That action was commenced by writ dated January 17, 1958. Certain matters which were raised at the hearing of the third action were not debated on appeal and the issues relating to the liability of the defendants were common to the three appeals.

At the trial the defendants contended, inter alia, that the liability alleged against them was governed by Greek law under which, by virtue of the Decree Law No. 3504 of 1956, they were not at the material times liable to the plaintiff bondholders under the guarantee. The plaintiffs, in reply, contended that it would be contrary to English public policy to give such or any effect to the Greek Decree Law No. 3504 on the ground that it was confiscatory and discriminatory in that it was enacted for the purpose of depriving a particular class of bondholders of rights of property vested in them immediately before such decree was passed.

The actions were heard together.

Diplock J. held that the decree of 1956 was not a law of succession or a law relating to capacity or status, but was in substance a law relating to the discharge of liabilities and altered rights which had vested in English law and as such was not, under English rules of private international law, effective to discharge the liability of the defendants to the plaintiffs as guarantors under the bonds and, accordingly, he gave judgment for the plaintiffs.

The defendants appealed.

T. G. Roche Q.C. and *N. H. Lever* for the defendants. It is not disputed that the proper law of the bonds is English law. In *National Bank of Greece and Athens S.A.* v. *Metliss* [3] the House of Lords held that the proper law of the bonds was English law and that, accordingly, no foreign law could discharge the old company, but that it was competent for a foreign legislature to deal with the status of a company incorporated in the territory of the foreign sovereign, and that it was, therefore, permissible to look at Greek law to see what its effect on status might be. An examination of Law 2292 of 1953 revealed that the defendants as successors took over the rights and obligations of the old companies, and that, therefore, the defendants were liable on the bonds. That was a question relating to personal status. By virtue of Law 3504 of 1956, however, the status of the defendants has been varied. It is wrong to say, as Diplock J.[4] did, that the defendants have been "substituted as a party by operation of a "law (albeit passed by the Greek Government) which the English "courts recognise as effective to bring about the substitution." The House of Lords did not so hold in the *Metliss* case [5]: see *per* Viscount Simonds.

It is of first importance in the present case to analyse and determine the ambit of the decision in the *Metliss* case.[5] That case decided: (i) Greek legislation could not discharge or suspend obligations under an English contract, that is, a contract governed by English law and to be performed in England. *Antony Gibbs & Sons* v. *Société Industrielle et Commerciale des Métaux* [6] was approved but distinguished. It followed that Metliss's contractual rights were not discharged or suspended either by the moratorium statutes or by Law 2292. (ii) It was within the competence of a foreign sovereign to legislate in respect of the status of a company incorporated under its laws and that an English court would give effect to such legislation. (iii) It being alleged that a Greek law imposed on a Greek company the status of successor to some other Greek company with the attendant obligation to meet a certain liability of the old company, that allegation was one relating to status and it was for the English court to ascertain as a question of fact (*a*) whether the allegation were true, that is, whether by Greek law the new company was successor to the old, and (*b*) whether by Greek law it was its duty to discharge all the obligations of the old company or this particular obligation. (iv) The plaintiff on the evidence had established both factors (*a*) and (*b*) in (iii).

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[3] [1958] A.C. 509.

[4] [1958] 2 Q.B. 59, 74.

[5] [1958] A.C. 509, 523.

[6] (1890) 25 Q.B.D. 399; 6 T.L.R. 393.

In the present case the plaintiffs, to succeed, must prove (1) that the old company would have been liable if it had been sued; (2) that at all material times the present defendants were by Greek law under a liability to discharge this particular obligation of the old company. The plaintiffs have established (1), which is a question of English law, but it is still necessary for them to establish (2), which is a pure question of fact to be established by evidence. On this latter point the *Metliss* case [7] is of no authority or assistance. Diplock J. was led into error because he did not recognise that these two questions are separate points, and in his judgment he tended to fuse them. He was wrong in saying [8] that "the discharge of contractual liabilities of "banks in the position of the defendants is obviously one of the "objects which Law No. 3504 is seeking to achieve." It was passed with the intent that the new company was not to be the successor of the old company and its effect was to vary the status of the new company.

Diplock J. did not, and, indeed, could not, in view of the authorities, dispute that the Greek Parliament was competent to dissolve the old company. He recognises (i) that Law 2292 could dissolve the old company without creating any successor; (ii) that if Law 2292 had been passed in the form in which it now is, an English court would have given effect to it. But that must be a recognition of the fact that Law 2292 in its amended form is within the competence of the foreign sovereign. What Diplock J.

[7] [1958] A.C. 509.

[8] [1958] 2 Q.B. 59, 75.

has held is that a decree of the Greek Parliament could not affect vested rights under an English contract. But the sole purpose of Law 3504 was to regulate the status of certain banking companies, inter alios, the defendants. Succession is part of the law of status, and therefore in the case of a company the relevant law to be applied is the law of its incorporation. Status is the foundation of the decision of the Court of Appeal in the *Metliss* case,[9] and the decision of the House of Lords in that case in no way differs from it: see *per* Lord Keith of Avonholm.[10] Further, if Diplock J. meant by vested rights contractual vested rights against third parties, there were none in existence against the defendants but merely contingent rights.

The rule that English courts will only have regard to the law of succession of the country of domicile at the date of the succession has no application to the case of foreign corporations. *Lynch* v. *Provisional Government of Paraguay*[11] and *In re Aganoor's Trusts*[12] are, accordingly, distinguishable. In English law the transfer of property and liabilities are governed by different rules. Property under English law is by its nature assignable; in the form of a conveyance in the case of land, a transfer in the case of a movable, and an assignment in the case of a chose in action. But liabilities are fundamentally different and can only be got rid of by means of a novation, that is, the creation of a new contract. In the case of succession to movable property in England the rule is that it passes to the person entitled at the date of death according to the law of the domicile of the deceased. It is certainly not within the competence of a foreign sovereign thereafter to pass legislation depriving persons of vested rights in property situate in England. But that is not this case.

Diplock J.[13] rejected the plaintiffs' argument that Law 3504 should be disregarded as being confiscatory and/or discriminatory, and his reasoning for so holding is adopted. Restrictions against the enforcement of foreign laws on the ground of public policy change from time to time, and today confiscatory foreign legislation is not regarded as immoral in itself. English courts will not enforce decrees that are of a revenue or penal nature (although it does not follow that the courts will not enforce a contract which requires the doing of an act which violates such laws), but, subject to that, effect will be given to foreign laws which it is within the competence of the foreign sovereign to enact, that is, in respect of property within its own domain, notwithstanding that they are confiscatory or discriminatory. [Reference was made to *Huntington* v. *Attrill*[14]; *Government of India* v. *Taylor*[15]; *Foster* v. *Driscoll*[16]; *Regazzoni* v. *K. C. Sethia (1944) Ltd.*[17]; *Aksionairnoye Obschestvo A. M. Luther* v. *James Sagor & Co.*[18]] In the "Russian bank" cases the English courts recognised the competence of the Government of the U.S.S.R. to confiscate the property within the Soviet Union of the banks in question and recognised the changed status of those banks.

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[9] [1957] 2 Q.B. 33, 42–48; [1957] 2 W.L.R. 570; [1957] 2 All E.R. 1.

[10] [1958] A.C. 509, 530, 531.

[11] (1871) L.R. 2 P. & M. 268.

[12] (1895) 64 L.J.Ch. 521.

[13] [1958] 2 Q.B. 59, 73, 74.

In the present case there was in fact no confiscation. Law 2292 of 1953 did not take away any vested rights of property. The bondholder had under his contract rights against the principal debtor and contingent rights against the guarantor bank. Law 3504 of 1956 did not affect such rights, for it was a law relating solely to status. Further, Law 3504 is not discriminatory but is a general law applying to every bank which was or will be amalgamated under Law 2292 of 1953; it does not apply only to the bonds held by the plaintiffs but to every bond issued or guaranteed by such banks in foreign currency. English law will only treat as discriminatory a law which discriminates against British subjects as such or against a person because he is that person; under this law all bondholders are treated alike. [Reference was made to *Wolff* v. *Oxholm*[19] and *In re Fried. Krupp Actien-Gesellschaft.*[20]]

In summary: (1) English law recognises that the United Kingdom is not the only sovereign power. (2) English law recognises that a foreign sovereign is entitled to legislate as to matters within its competence and will apply that legislation. (3) The status of a foreign company is a matter within the legislative competence of the sovereign of the State of incorporation. (4) Foreign legislation cannot discharge or suspend a contractual obligation arising under the contract of which the proper law is English and which is to be performed in England. (5) A foreign legislature can impose on a company incorporated under its law the status of successor to some other company so incorporated *not* so as to discharge the liability of the old *but* so as to impose

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[14] [1893] A.C. 150; 8 T.L.R. 341.

[15] [1955] A.C. 491; [1955] 2 W.L.R. 303; [1955] 1 All E.R. 292.

[16] [1929] 1 K.B. 470; 45 T.L.R. 185.

[17] [1958] A.C. 301; [1957] 3 W.L.R. 752; [1957] 3 All E.R. 286.

[18] [1921] 3 K.B. 532, 557–559; 37 T.L.R. 777.

[19] (1817) 6 M. & S. 92.

[20] [1917] 2 Ch. 188.

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on the new as an incident of its status a duty to discharge some or all of the liabilities of the old company. (6) When it is alleged that a foreign company has the status of a successor to another foreign company so as to make it liable to pay a particular debt, which would have been payable by the old company under a contract, it is a question of fact whether the foreign law did at the material time have the effect claimed. (7) The plaintiffs' case here is that they presented certain coupons on various dates after July 16, 1956, and they were not paid by the principal debtor. Does that suffice to prove that the old guarantor bank would have been liable? That is a matter of English law and the defendants concede that the plaintiffs have established that point. But the plaintiffs still have to establish, that is, prove, that after July 16, 1956, the new company was by Greek law the successor of the old company in relation to these bonds, that is to say, that they still possessed in Greek law a status which imposed upon them the duty to discharge that particular obligation of the old company. If that is the test, they have not proved their case, since the expert witnesses on both sides agreed that the defendants were not successors of the old company, nor were they under an obligation to discharge this liability. The present case differs from the *Metliss* case [21] not upon the law but upon its facts. [Reference was also made to *Beavan* v. *Lord Hastings* [22] and *Onslow* v. *Corrie*.[23]]

John Foster Q.C. and *Mark Littman* for the plaintiffs. It is submitted: (1) The new decree, 3504 of 1956, is not a law of succession as regards the new bank. (2) If the new decree is a law of succession, it is a law of succession which has been passed after the date when the new entity was created, that is, after the succession. (3) The new decree is contrary to English public policy.

In the *Metliss* case [24] the defendants when sued contended that they were not liable because of the amalgamation under Law 2292. That contention failed. In the present case they say that they are relieved of their obligation by reason of Law 3504. This is an a fortiori case in favour of the plaintiffs than the *Metliss* case,[25] and the observations therein of Viscount Simonds are equally apt: "It must be apparent that, if the appellants are "right, a strange situation is revealed. Here is a company whose "status is recognised by the courts of this country because it

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[21] [1958] A.C. 509.
[22] (1856) 2 K. & J. 724.
[23] (1817) 2 Madd. 330.
[24] [1958] A.C. 509.
[25] Ibid. 522.

"is incorporated by the law of its domicile. By that law it is "invested with duties, powers, assets, liabilities. It admits "that if sued in Greece, it would be liable on the bonds here in "question, subject always to the benefit of any moratorium. It "comes to this country, carries on its business, and assumes "unchallenged possession of the assets of the dissolved company. "It is the strange climax of this narrative that it then disclaims "a liability to which that dissolved company was undoubtedly "subject. I do not think that an English court of justice should "readily give effect to such a pretension."

The plaintiffs' claim is not based on a statutory right in Greek law; the Greek law substituted the defendants for the original guarantor, and therefore the plaintiffs' claim is one in contract against a person who stands in the shoes of the guarantor.

(1) The defendants have assumed that Law 3504 is a law of succession. In our submission, however, it is not a law affecting the incidence of status. Certainly the *Metliss* case[26] did not decide that all questions relating to the assets and liabilities of the banks in question were matters relating to status. Under the rules of English private international law it is for an English court, not a Greek court, to decide into what category the particular law falls: see the *Metliss* case.[26] Diplock J. was correct in categorising this law as a law of discharge. It discharged in Greek law the new bank from its liabilities to the bondholders, leaving them with no remedy on an English contract, when, admittedly, the old bank would have been liable and the new bank would have been liable up to July 15, 1956. The defendants' argument, if accepted, would achieve the object of an English contract being discharged by a foreign law, which is contrary to the decisions in *Antony Gibbs & Sons* v. *Société Industrielle et Commerciale des Métaux*[27] and *Kleinwort, Sons & Co.* v. *Ungarische Baumwolle Industrie Aktiengesellschaft.*[28] Further, it would be contrary to the policy of English law to recognise an amalgamation purporting to transfer all the assets of the old companies and not all of their liabilities: *Nokes* v. *Doncaster Amalgamated Collieries Ltd.*[29] "Otherwise the transfer of the "assets would very much resemble a fraudulent conveyance": *per* Lord Atkin,[30] and see also the observations of Lord Porter.[31]

In referring to vested rights the defendants have confused the

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[26] [1958] A.C. 509.

[27] 25 Q.B.D. 399.

[28] [1939] 2 K.B. 678; 55 T.L.R. 814; [1939] 3 All E.R. 38.

[29] [1940] A.C. 1014; 56 T.L.R. 988; [1940] 3 All E.R. 549.

[30] [1940] A.C. 1014, 1029.

[31] Ibid. 1050.

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difference between a *conditional* right and a *contingent* right. One is a condition, the other an expectancy. The parties to an executory contract may not have fulfilled the prescribed conditions, but nevertheless they have vested rights under it. In the present case the bondholders had a conditional or vested right, for all that a bondholder was required to do to get payment was to present coupons. Law 3504 is an attempt to defeat a right arising under a contract the proper law of which is English law. [Reference was made to *Boguslawski* v. *Gdynia Ameryka Linie*.[32]]

[MORRIS L.J. Could a bondholder after the 1953 decree opt to wind up the old company in England or was he obliged to pursue any remedy he might have against the new company?]

He was obliged to sue the new company because all the assets were transferred to it. There could be no winding up of the old company under section 400 of the Companies Act, 1948, since (*a*) the court would not exercise its discretion, and (*b*) there would be no assets for the liquidator to get in. The "Russian bank" cases are distinguishable because there there were assets to get in.

It does not advance the argument to raise the question whether Law 3504 was within the competence of the Greek legislature, because the preliminary question is: is the decree of 1956 a law of succession or of discharge? It is plainly a law of discharge, since it does no more than discharge the defendants from paying the English bondholders. Law 3504 only applies to the new bank; it does not operate on the old bank which has gone. It states that the new bank is not liable on the guarantee and it makes no reference to the old bank. A "succession" which only operates on one party to the succession is not a law of succession. In 1956 only the new amalgamated bank was in existence, the old bank being "dead and buried," for it had no assets. To make Law 3504 retrospective does not make it a law of succession. Diplock J. was right in holding that the new decree was one relating to liability and not one relating to capacity or status. The *Metliss* case[33] decides that the English courts will recognise a universal succession. But where, as in Law 3504, there is only a partial succession, it is submitted the courts will not recognise it.

(2) In English private international law the law governing the succession to the assets and liabilities of the deceased is the law of the deceased's domicile as at the date of death: *Lynch*

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[32] [1950] 2 All E.R. 355, 365.

[33] [1958] A.C. 509.

v. *Provisional Government of Paraguay.*[34] That principle has been extended to include the proposition that the incidence of status cannot be changed retrospectively: *In re Marshall, decd.*[35] It is submitted that *Lynch's* case [36] is of general application and that the decision was not based on the narrow ground that it related to a criminal matter or that it concerned assets in England. The principles enunciated by Lord Penzance [37] are just as cogent in their application to fictitious, that is, juristic, persons, namely, corporations, as they are to natural persons, and, therefore, they should be applied to the present case by analogy. *Lynch's* case [38] is authority for the proposition that, if there is a change in the law relating to property after that property has passed, the English courts will not take cognisance of it.

On the assumption that there is no analogy between the case of the decease of a natural person and the dissolution of a corporation, but that nevertheless the principle of *Lynch's* case [39] is sound because it is founded on good reason, then it should be applied to the present case, because it would be unjust for the English creditors to be deprived of their rights against the new entity by recognition of a law of succession which operates retrospectively. To hold to the contrary would run counter to the observations of Viscount Simonds in the *Metliss* case.[40] [Reference was made to *In re Aganoor's Trusts.*[41]] Further, the courts have recognised that it is a desirable principle, since in *In re Marshall, decd.*[42] it was extended to cover the incidence of status.

(3) Law 3504 is contrary to public policy because it is contrary to " the principle of rational justice," to adopt Viscount Simonds' observations in the *Metliss* case [43] concerning Law 2292. Recognition of the new decree would cause injustice to the bondholders, and, therefore, the English courts will not countenance it: see per Denning, Romer and Parker L.JJ. in the *Metliss* case.[44] Further, Law 3504 is confiscatory in its nature, since it deprives the English creditors from suing on the guarantee. [Reference was also made to Dicey's Conflict of Laws, 7th ed., p. 484; *In re Claim by Helbert Wagg & Co. Ltd.*[45]]

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[34] (1871) L.R. 2 P. & M. 268, 271, 272.

[35] [1957] Ch. 507, 525; [1957] 3 W.L.R. 538; [1957] 3 All E.R. 172.

[36] L.R. 2 P. & M. 268.

[37] Ibid. 271, 272.

[38] L.R. 2 P. & D. 268.

[39] Ibid.

[40] [1958] A.C. 509, 522.

[41] 64 L.J.Ch. 521.

[42] [1957] Ch. 507.

[43] [1958] A.C. 509, 525.

[44] [1957] 2 Q.B. 33, 45, 48, 49, 52, 53.

[45] [1956] Ch. 323.

Roche Q.C. in reply. (1) It was said that Law 3504 was not a law of succession as regards the new bank. The plaintiffs' contentions on this part of their argument may be analysed as follows: (*a*) The plaintiffs allege that the English courts recognise that succession to the estates of deceased persons is governed by the law of the deceased's domicile. (*b*) By analogy the English courts *ought* to recognise that succession to the assets of dissolved corporations is governed by the law of the corporation's domicile at the date of dissolution. (*c*) It was on the basis of that analogy that the House of Lords in the *Metliss* case [46] applied Law 2292 of 1953. (*d*) No company was dissolved in 1956, therefore Law 3504 was not a law of succession qua this company, and, accordingly, the English courts cannot recognise Law 3504.

As to (*a*), it does not mean that the English assets of a deceased foreigner are administered by the law of the domicile; they are administered by English law under which the personal representative pays the debts on such assets. The *succession* is to the net estate after administration. The following passage from Dicey's Conflict of Laws, 7th ed., p. 598, is adopted as part of the defendants' argument: "When the estate of a deceased "person has been fully administered, that is to say when all "debts, duties and expenses have been paid, the question arises "by what law the beneficial distribution of his net estate is to "be governed. So far as movables are concerned the law is now "well settled, that the succession to the movables of an intestate "is governed by the law of the country in which he was domiciled "at the date of his death. Changes in the law of his domicile, "made after his death, are to be disregarded." Distribution of the net estate is to be contrasted with administration: see Dicey's Conflict of Laws, 7th ed., p. 591. As regards (*b*), if one does proceed by analogy to apply the above rule to the assets of a dissolved foreign company it is necessary to consider what is the analogous case. The true analogy would be where an English court makes a winding-up order against a foreign company. After payment of its debts the remaining assets should be distributed according to the law of the company's incorporation at the date of dissolution. But that case has no bearing on the question as to who should pay the *debts* of the dissolved company. As to (*c*); this shows a complete misconception of the ratio decidendi of the Court of Appeal and of the House of Lords in the *Metliss* case.[47] It is true that Law 2292 was regarded as a law of succession, but the basis of the decision was that the law affected the status of corporate bodies and that English law applies the law of the domicile in questions of status. It is not without significance that both in the Court of Appeal and in the House of Lords in the *Metliss* case[48] reference was made not to English law but to the Roman law of universal succession, which conferred a personal status on the heir making him liable for the debts of the deceased. It is because succession is part of the law of status that Denning L.J. in the Court of Appeal in the *Metliss* case[49] accepted that Law 2292 was to be recognised, since it conferred on the new company a personal status as successor to the old company: see also *per* Romer L.J.[50] and *per* Parker L.J.[51] in the Court of Appeal, and *per* Viscount Simonds,[52] *per* Lord Tucker[53] and *per* Lord Keith of Avonholm[54] in the House of Lords. As regards (*d*), it is a fallacy to suggest that because Law 3504 is not a law of "succession" within the limited meaning given to that term by the plaintiffs, that, therefore, the English courts will not recognise it. A fair analogy to that type of reasoning would be the statement: "A pansy is a plant. This object before "me is not a pansy. Therefore it is not a plant!"

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[46] [1958] A.C. 509.

All contingent rights are conditional on the happening of some event which may or may not happen. The liability of a guarantor is always a contingent liability. In the present case the mortgage bank's liability was conditional on the bonds being presented within six years of the date they bore.

Gibbs' case[55] was cited in support of the proposition that a foreign legislature has no power to discharge a party to an English contract, and that, accordingly, since Law 3504 did discharge a party to an English contract, the English courts will not recognise it. But that is based upon the supposition that the new company was a party to an English contract. The question may well be asked, how did they become a party? because no consensus of any sort is alleged.

(2) Succession is in relation to the net estate as stated above. The English courts do not recognise the doctrine that liabilities are to be governed by the law of domicile: see Dicey's Conflict of Laws, 7th ed., pp. 581, 599. There is no reported decision

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[47] [1958] A.C. 509.

[48] [1957] 2 Q.B. 33, 42, 43; [1958] A.C. 509, 524.

[49] [1957] 2 Q.B. 33, 46.

[50] Ibid. 48.

[51] Ibid. 52.

[52] [1958] A.C. 509, 525.

[53] Ibid. 529.

[54] Ibid. 530.

[55] 25 Q.B.D. 399.

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of a foreign personal representative being sued in the English courts. Even if the foreign heir can be sued here, as suggested in *Beavan* v. *Lord Hastings*,[56] that does not assist in relation to the present question. [Reference was made to *Lynch* v. *Provisional Government of Paraguay*[57] and *In re Aganoor's Trusts*.[58]]

(3) Law 3504 is not confiscatory, for it does not confiscate any vested right of property under an English contract. Law 2292 provided a statutory remedy enabling the bondholders to enforce their rights against the new company, and if the Greek legislature subsequently abolish such statutory remedy, that does not amount to confiscation in law. If it were otherwise it would be an equally valid argument to suggest that if the English Parliament were to repeal section 400 of the Companies Act, 1948, providing for the winding up of overseas companies, no foreign court would take cognisance of it. If, contrary to the above, it is held that Law 3504 is confiscatory, then it is submitted that nevertheless such confiscatory legislation will be recognised here under the principles enunciated by Scrutton L.J. in *Aksionairnoye Obschestvo A. M. Luther* v. *James Sagor & Co.*[59] If it be suggested that Law 3504 is discriminatory, then it is pertinent to point out that most modern legislation tends to be discriminatory against some class of persons or property.

Cur. adv. vult.

April 29, 1959. LORD JENKINS. The judgment about to be read by Morris L.J. is the judgment of the court in these appeals.

MORRIS L.J. The question which is raised in these appeals is whether the appellant bank (the defendant company) is liable for the amounts of certain interest payments and principal sums which in the first instance became due from the National Mortgage Bank of Greece as principal debtors on dates subsequent to July 16, 1956. The amounts were due in respect of sterling mortgage bonds issued by that bank in 1927. Interest payments, on coupons duly presented, became due to various holders on dates between July 28, 1956, and August 22, 1956. One of the actions now under appeal relates to these amounts. That action was commenced by writ dated September 17, 1956. Another of the actions relates to interest payments which became due on dates subsequent to August 9, 1956. That action was commenced by writ dated June 4, 1957. A third action relates to the amounts of certain principal sums which became due on December 1, 1957, and to certain arrears of interest. That action was commenced by writ dated January 17, 1958. In each case the claims indorsed on the writs were expressed to be against the appellant bank "as guarantors." Certain matters which were raised at the hearing of the third action have not been debated in this court and the issues relating to the liability of the appellant bank are common to the three appeals.

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[56] 2 K. & J. 724.
[57] L.R. 2 P. & M. 268.
[58] 64 L.J.Ch. 521.
[59] [1921] 3 K.B. 532, 557–559.

The payment of the principal moneys and interest as they became due from the National Mortgage Bank of Greece had been guaranteed by the National Bank of Greece. The last-named bank no longer exists. The facts relating to the bonds and the circumstances under which the last-named bank came to be extinguished and the appellant bank came into existence are authoritatively recorded in the speech of Viscount Simonds in *National Bank of Greece and Athens S.A.* v. *Metliss.*[1] The National Mortgage Bank of Greece, the principal debtor, remains in existence but apparently does not flourish to an extent that has enabled it to pay the sums due. The significance of the date, July 16, 1956, is that Greek law was then changed as a result of the passing of Legislative Decree No. 3504. That decree was not in issue in the *Metliss* case.[2]

Decree No. 3504 amended the provisions of paragraph 2 of article 4 of Statute 2292 of 1953 and the amendment was to have retrospective effect. Decree No. 3504 further provided for the abolition of paragraph 5 of the royal decree of February 26/27, 1953. The provisions of Decree No. 3504 were as follows: "Article 1. Paragraph 2 of article 4 of Statute 2292/53 'on the "'amalgamation of limited liability banking companies' is "replaced as from the time it came into force with the following: "'The Company which has absorbed another company by amal- "'gamation or the new company created by amalgamation "'becomes the universal successor to the rights and obligations "'of the companies amalgamated without the necessity of any "'other formality or action, with the exception of the obligations "'of these companies as principal debtors, guarantors or for any "'other cause deriving from bonds, securities in general or con- "'tracts or any other cause and relating to loans in gold or

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[1] [1958] A.C. 509; [1957] 3 W.L.R. 1056; [1957] 3 All E.R. 608.

[2] [1958] A.C. 509.

"'foreign currency by bonds or otherwise payable to the bearer "'issued by the limited liability companies, juridical persons of "'public law, municipalities and communes, etc. The Company "'which has absorbed another company or is newly created by "'amalgamation does not acquire nor is it considered as having "'acquired by virtue of this present or other statute or decree "'or articles of association published in pursuance of this present "'law or in any other manner the above obligations deriving from "'loans in gold or foreign currency until a law is passed providing "'the extent and the manner in which they will become subject "'to these obligations."

"Article 2: Paragraph 5 of Article Sole of the royal decree "dated February 26/27, 1953 'on the amalgamation of the "'National Bank of Greece and the Bank of Athens by the "'creation of a new limited liability banking Company' is "abolished as from the time of its publication. The rights and "obligations of the new limited liability banking company created "by the said decree under the name of 'National Bank of Greece "'and Athens S.A.' are governed as from the time the Company "was created by the relative provisions of Statute 2292/1953 as "amended by the present law."

"Article 3: The present comes into force as from its publication in the Government Gazette."

The effect of Legislative Decree No. 3504 was, therefore, that the rights and obligations of the appellant bank (which was created by the royal decree dated February 26/27, 1953, promulgated under the provisions of Statute No. 2292) were governed, as from the time that the appellant bank was created, by the relative provisions of Statute 2292 as amended by the Legislative Decree No. 3504. The result was that by legislation having retrospective effect there was no succession to the obligations of the National Bank of Greece as guarantors of the bonds with which this litigation is concerned.

The evidence showed that under Greek law, if the moratorium statutes were left out of account, the appellant bank would have been held liable as successors to the guarantors in respect of interest coupons presented before the passing of Decree No. 3504 in actions heard before the passing of such decree, but would not have been, nor would be, held liable in respect of coupons presented after such decree. Under Greek law, therefore, if the present claims had been put forward against the appellant bank in the Greek courts they would have failed even had there been no moratorium statutes in existence. Herein lies a difference between the claims now made and the claim made by Metliss which, had there been no moratorium statutes, could have been upheld in the Greek courts.

Upon what basis, then, are the present claims advanced in this country against the appellant bank? The answer to this must be sought by referring to the statements of claim. For convenience we refer to the statement of claim in the action commenced in 1956. Paragraphs 1–4 set out that the plaintiffs were the bearers of certain bonds, set out the terms and the modified terms of such bonds, and record that the National Bank of Greece had unconditionally guaranteed the due payment of the principal moneys and interest. Paragraphs 6 and 7 allege that the mortgage bank were in arrears with interest payments after coupons had been duly presented for payment and allege that notices had been given to the appellant bank who had not paid the amounts of the interest payments. The facts alleged in those paragraphs were all either proved or admitted. The basis of the claim against the appellant bank was put forward in paragraph 5 of the statement of claim as follows: "The defendants are a "corporation constituted under the laws of Greece and carrying "on business (inter alia) at 6, Old Jewry, E.C.2, in the County "of London. By a Greek Decree dated February 26, 1953, "and/or Article 4 of a Greek Act No. 2292 the entire assets and "liabilities of the National Bank of Greece (including their "liability under the said guarantee) was transferred to the "defendants as the universal successor of the National Bank of "Greece." It was, however, proved in evidence that when the plaintiffs brought their action the appellant bank were not, by Greek law, liable to the plaintiffs. How, then, can the plaintiffs succeed? To advance upon the road to success they must place dependence upon Greek law. This is shown by the speeches of their Lordships in the *Metliss* case.[3] What the plaintiffs have done in the present actions is in the first place to assert and to rely upon Greek law, but to set up Greek law in the form in which it was enacted in February, 1953, and which was to their advantage and to claim to be entitled to ignore the amendments to the Greek law made in July, 1956, which are to their disadvantage. The question raised in the appeals is whether so singular a process of selectiveness can be justified.

It seems to us that those who need recourse to Greek law must take it as they find it. If they assert that Greek law can endow, they must recognise that Greek law can disendow. If they aver that Greek law can create, they must accept that Greek law can change. If they need to have the foundation of Greek law upon which to build a claim, they can hardly say that Greek law as it used to be suits them far better than Greek law as it is.

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[3] [1958] A.C. 509.

Though the proper law of the bondholders' contracts was English law and though, therefore, no foreign sovereign authority could vary the terms of the contracts, the bondholders must always have recognised that the existence of the Greek guaranteeing bank could be terminated by Greek law. If that happened the contract as such would not be altered though the guarantor would disappear. That was always a risk that the bondholders ran. The guaranteeing bank was extinguished by Greek law. A new Greek bank, the appellant bank, was created by Greek law. By Greek law it was given certain attributes and certain duties. One duty was to pay certain sums which the defunct bank as guarantor would have been liable to pay. The question raised in the *Metliss* case [4] was whether in a suit in England this obligation under Greek law could found a claim. Viscount Simonds referred in his speech to the importance and novelty of the question raised, and he proceeded [5]: " . . . I am not aware of any "case, nor has the industry of counsel discovered one, in which "in the courts of this country a plaintiff has, without a plea of "novation or statutory assignment, recovered a sum due under a "contract from one who was not a party to that contract." Then later Viscount Simonds said [6]: "But, my Lords, in the "end and in the absence of authority binding this House, the "question is simply: What does justice demand in such a case "as this? I believe that justice will be done if your Lordships "think it right not only to recognise the fact that the new "company exists by the law of its being, but to recognise also "what it is by the same law. It is conceded that its status must "be recognised. That is a convenient word to use. But what "does it include or exclude? If a corporation exists for no other "purpose than to assume the assets, liabilities and powers of "another company, what sense is there in our recognising its "existence if we do not also recognise the purposes of its existence and give effect to them accordingly. If, for reasons of "comity, we recognise the new company as a juristic entity, "neither the Greek Government, the creator, nor the new com-"pany, its creature, can complain that we too clothe it with all

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[4] [1958] A.C. 509.

[5] Ibid. 521.

[6] Ibid. 525.

" the attributes with which it has been invested. Thus and thus " alone, as it appears, justice will be done." Lord Tucker in his speech said [7]: " The identity of the old bank has become merged " in the amalgamation by a process which is by no means alien " to English legal conceptions. It is of the very essence of the " transaction that the liabilities and assets of the former should " attach to the latter, and to recognise the existence of the new " entity but to ignore an essential incident of its creation would " appear to me illogical. Why an English court should be compelled to recognise that part of the decree which has extinguished the old bank but refuse to give effect to matters which " are of the essence of the process of amalgamation, I find it " difficult to understand. In my view, the fact that this liability " was attached to it at birth by its creator can properly be " regarded as a matter pertaining to the status of the appellant " company and accordingly governed by the law of its domicile."

But now, by reason of the passing of Decree No. 3504, the position is different. How, then, are the claims supported? The judge was of the opinion that the rights which the plaintiffs are seeking to enforce are contractual rights and are nonetheless so because the legal person against whom they seek to enforce them " was not originally a party to the contract but has been " substituted as a party by the operation of a law (albeit passed " by the Greek Government) which the English courts recognise " as effective to bring about the substitution." [8] But in our judgment the appellant bank has not been substituted as a party to the contract. In his speech in the *Metliss* case [9] Viscount Simonds pointed out that there was no plea of novation or statutory assignment and that novation could not be alleged. The relevant paragraph in the statement of claim in that action was as follows: " 7. The defendants are a corporation constituted " under the laws of Greece and carrying on business inter alia " at 6 Old Jewry, E.C.2, in the County of London. By a Greek " Decree dated February 26, 1953, the entire assets and liabilities " of the National Bank of Greece (including their liability under " the said guarantee) were assigned and transferred to the " defendants."

The contract of guarantee which was entered into by the National Bank of Greece was a contract to be governed by English law. The Greek legislature could not alter the terms of that contract. The Greek legislature could, however, terminate the existence of the guaranteeing bank. When it did so it created the appellant bank and charged it with the responsibilities of the defunct bank. That was fortunate for the bondholders, for they could assert that though the appellant bank was a stranger so far as their contractual rights were concerned, yet by reason of the comity between States they could invite the English courts to recognise the status and the attributes of the new entity. Now it is said that Decree No. 3504 may be ignored because it is a foreign law which purports to discharge contractual liabilities. But there were no contractual liabilities as between the appellant bank and bondholders.

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[7] [1958] A.C. 509, 529.

[8] [1958] 2 Q.B. 59, 74.

[9] [1958] A.C. 509, 521, 522.

It was further held by the judge that after the appellant bank came into existence the bondholders acquired vested rights in English law as against the appellant bank and that the English courts ought not to give effect to any foreign legislation which purported to annul such vested rights. An examination of that conclusion need not depend upon considering the precise applicability of the word "vested." The position was that on various dates after July 16, 1956, the plaintiffs became contractually entitled to receive sums of money in the first place from the National Mortgage Bank of Greece and, in the event of failure by that bank to pay, from the National Bank of Greece: if they had owned their bonds in the period between February 27, 1953, and July 16, 1956 (which they may or may not have done), they would have known that their rights as against the National Bank of Greece (if recourse to them as guarantors became necessary) would be unavailing for the reason that that bank had ceased to exist: they would, however, in that period, in the event of default by the National Mortgage Bank of Greece, have been able to sue the appellant bank in England for amounts becoming due in that period. But the basis of their potential claims against the appellant bank was that which is laid down in the *Metliss* case.[10] In the period before July 16, 1956, bondholders would, in respect of amounts to become due in the future (assuming they knew the law), have looked forward to the expectation of being able, if need be, to claim in the future against the appellant bank. But that would be on the assumption that Greek law remained as it was.

It seems to us that if it is alleged that a foreign company has the status of a successor to another foreign company so as to make it liable to pay a particular debt which would have been payable by the old company under a contract, it becomes a question of fact whether the foreign law did at the material time bestow such a status. When Greek law was changed by Decree 3504 the effect, so far as bondholders were concerned, was to remove the prop of Greek law upon which they could have hoped to have founded claims against the appellant bank. It does not seem to us that an English court could any more refuse to recognise the fact of a change in Greek law than it could refuse to pay attention to any other relevant fact.

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[10] [1958] A.C. 509.

The fact that Decree 3504 was made retrospective is not of consequence in these appeals, which relate to amounts which became due after the passing of Decree 3504. It might be, though this possibility does not affect any question of liability, that some of the plaintiff bondholders only became owners of their bonds after the passing of the Decree.

It is said that Decree 3504 is not a law of succession and that as it was passed after the appellant bank came into existence it should in any event not be recognised as a law of succession as regards the appellant bank. It is further said that it does not become a law of succession by being made retrospective. We do not derive assistance from the attempt to apply to Decree 3504 some label of precise description. Decree 3504 seems, at least so far as Article 1 is concerned, to be a general law which, modifying Law 2292, was to be of general application to company amalgamations. But whether "law of succession" is or is not the appropriate description, the decree does in our judgment re-define and vary the status and the attributes applied by Greek law to the appellant bank. It is said that the decree should not be regarded as a law of succession but rather as a law of discharge because it was passed after the appellant bank came into existence and because its effect was to exonerate the appellant bank from further liability: to this is added the submission that bondholders cannot by a foreign decree be deprived of their rights under a contract governed by English law. But these submissions do not take due account of the nature of the bondholders' present claims. The claims are not claims in contract against the appellant bank. Until Greek law was altered, the position was, as Lord Keith pointed out in his speech in the *Metliss* case,[11] that the appellant bank represented and stood in the shoes of the contractual guarantor, the National Bank of Greece. They have not done so since the passing of Decree 3504.

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[11] [1958] A.C. 509, 530.

But this does not mean that there was any purported interference with contracts governed by English law. As Viscount Simonds said in his speech in the *Metliss* case [12]: "Clearly the "obligations in English law (the proper law of the contract) "could not be affected by a Greek law which purported to vary "its terms." The contracts remain unaffected by any of the Greek legislation. There was, however, a period when the law of Greece directed the appellant bank to undertake certain liabilities: while that period lasted bondholders found a substitute for their contractual debtor: but it was just as competent for the Greek sovereign power to terminate the period as it was for such power to originate it. The effect of the new decree may be to deprive bondholders of a hope to which they had looked forward, but their hope had as its basis the further hope that Greek law would remain as it was. It was fully within the competence of the Greek sovereign power to pass Decree 3504. When the law was changed, there was, so far as bondholders were concerned, the withdrawal of what had resulted to their advantage: but that does not mean that Decree 3504 was either confiscatory or discriminatory in its scope or was of the nature of a penal or revenue law or that English public policy could demand that it be not recognised. All bondholders alike would be affected by the change in the law. Nor does it seem to us that the respondents can derive assistance from *Lynch* v. *Paraguay Provisional Government*.[13] If English law lays it down that the succession to property in England of a deceased foreigner is regulated by the law of his place of domicile as it existed at the time of his death, then any change in the law of the place of domicile after the death of the deceased becomes irrelevant and immaterial. Lord Penzance pointed out how inconvenient and unjust might be the consequences if English law adopted a different rule under which it was necessary to give effect to retrospective changes that the legislative authority of the foreign country might later make in that law.

It is said that at the time of the decree in February, 1953, though bondholders would appreciate that the assets of the National Bank of Greece were being taken over by the appellant bank, yet they (the bondholders) might refrain from taking any steps open to them in England under the Companies Act because of the knowledge that the appellant bank were being charged with the liabilities of the National Bank of Greece: it is said that as the appellant bank did take over the assets of the defunct bank and that as such assets would no longer be assailable at the instance of bondholders, any enactment which relieves the appellant bank of any obligation to bondholders should be regarded as being confiscatory in nature and one which on principles of rational justice should be disregarded. But in our judgment any bondholders who had looked ahead to an expectation of claiming, if necessary, against the appellant bank must have recognised that their recourse against the appellant bank would depend not upon any contractual rights but upon establishing that by Greek law the appellant bank was required to discharge certain obligations. That they cannot now do. The reflection that in the past and in reference to obligations accruing in the past they could have done so may give rise to disappointment but does not establish any present liability in the appellant bank.

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[12] [1958] A.C. 509, 526.

[13] (1871) L.R. 2 P. & M. 268.

In our judgment the bondholders fail to show that they can recover from the appellant bank and we allow the appeals.

Appeals allowed.
Leave to appeal to the House of Lords.

Solicitors: *Stibbard, Gibson & Co.; Herbert Smith & Co.*

J. A. G.

ADDIS *v.* CROCKER AND OTHERS.

[1959 A. No. 18.]

1959
July 8, 9, 13.

Gorman J.

Libel and Slander—Libel—Privilege—Absolute privilege—Judicial Tribunal — Disciplinary Committee of Law Society — Publication of order and findings relating to complaint against solicitor—Statements implicating third party not solicitor—Whether publication protected by absolute privilege—Solicitors Act, 1957 (5 *&* 6 *Eliz.* 2, *c.* 27), *ss.* 46 (1), 49—*Solicitors* (*Disciplinary Proceedings*) *Rules,* 1957 (*S.I.* 1957, *No.* 2240), *r.* 21.

The Disciplinary Committee of the Law Society constituted and conducted in accordance with section 46 of the Solicitors Act, 1957,[1] and the Solicitors (Disciplinary Proceedings) Rules, 1957,[2] made thereunder, inquired into allegations of professional misconduct made against a certain solicitor. Arising out of the publication of the committee's findings and order, in which they found that the allegations against the solicitor had not been substantiated, the plaintiff (who was not a solicitor) brought a libel action against the members of the committee, alleging that certain statements in the findings and order which related to him were defamatory. The defendants set up a claim for absolute privilege in respect of the publication complained of and an order was made that the claim for privilege should be disposed of before the trial of the action:—

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[1] Solicitors Act, 1957, s. 46: "(1) The Master of the Rolls shall "appoint from among members of "the Council [of the Law Society] "and such former members of the "Council as are practising as solici- "tors in England a disciplinary com- "mittee consisting of such number of

Held, that the inquiry of the Disciplinary Committee, which was a statutory committee, was an authorised inquiry in the nature of a judicial inquiry which exercised judicial functions; accordingly, the publication of its findings and order, which occurred in the course of and formed part of its proceedings, was absolutely privileged and no action for defamation would lie in respect thereof.

Royal Aquarium and Summer and Winter Garden Society Ltd. v. *Parkinson* [1892] 1 Q.B. 431; *Copartnership Farms* v. *Harvey-Smith* [1918] 2 K.B. 405; 34 T.L.R. 414; *O'Connor* v. *Waldron* [1935] A.C. 76; 51 T.L.R. 125 considered.

PRELIMINARY POINT OF LAW.

On May 23, 1958, an application was made by a solicitor acting on behalf of the Law Society to a Disciplinary Committee of the Society set up by virtue of section 46 (1) of the Solicitors Act, 1957, asking that a certain solicitor might be required to answer allegations of professional misconduct as a solicitor. The allegations concerned the conduct of a clerk in his employ. The Disciplinary Committee was composed of the three defendants, Sir William Charles Crocker, Sir Walter Charles Norton and Sir

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"persons, not being less than three "nor more than nine, as he may "from time to time think fit, and "may from time to time remove any "member from, or fill any vacancy "in, or, subject to the limits aforesaid, increase the number of the "members of, that committee. . . . "(3) The quorum of the disciplinary "committee . . . shall for all purposes "be three: Provided that the decision "of the committee . . . on an application or complaint may be announced "by a single member thereof. (4) . . . "the disciplinary committee, with the "concurrence of the Master of the "Rolls, may from time to time make "rules for regulating the making to "the committee, and the hearing and "determining by the committee . . . "of applications or complaints under "this Act. . . ."

S. 49: "Every order made by the "disciplinary committee . . . on an "application or complaint made to "the committee under this Act shall "be prefaced by a statement of their "findings in relation to the facts of "the case and shall be signed by the "chairman of the committee or by "some other members of the committee authorised by the committee in "that behalf. . . ."

[2] Solicitors (Disciplinary Proceedings) Rules, 1957, r. 21: "The committee shall hear all applications in "private, but shall pronounce their "findings and order in public."

Leslie Peppiatt. On June 12, 1958, the plaintiff, Jasper Jocelyn Addis, an inquiry agent, presented a written request to the committee asking to be heard in denial of so much of the allegations in the application as he alleged falsely referred to him. His application was refused. On June 26, 1958, the committee heard the application against the solicitor in private as provided by rule 21 of the Solicitors (Disciplinary Proceedings) Rules, 1957, made pursuant to the Act of 1957, and on August 14, 1958, published their findings and order as provided by rule 21. The committee found that the allegations against the solicitor had not been substantiated. In their findings and order they set out certain evidence given by the respondent solicitor and certain references were made therein to the plaintiff which the plaintiff alleged were libellous of him. He accordingly issued a writ against the three members of the committee, claiming that the findings and order was falsely and maliciously published by the first defendant with the knowledge and consent of the second and third defendants, and of which all three were joint authors, and the document purported to be published concerning the affairs of the Law Society, of which he was not a member. In his statement of claim he referred specifically to certain paragraphs in the findings and order.

In their defence the defendants claimed that the publication complained of was made by them as members of the committee set up under sections 46 to 48 of the Solicitors Act, 1957, and the Solicitors (Disciplinary Proceedings) Rules, 1957, made thereunder, being their findings, order and determination of the application of May 23, 1958, and that the publication occurred in the course of and formed part of proceedings before a statutory tribunal exercising judicial functions and was therefore absolutely privileged. Alternatively, they pleaded that the publication was protected by qualified privilege. In his reply the plaintiff alleged malice in respect of the defence of qualified privilege.

An application made by the defendants under R.S.C., Ord. 25, r. 4, to strike out the statement of claim was allowed, but Devlin J. allowed the plaintiff's appeal against that order. Ultimately, on May 11, 1959, an order was made in chambers that the following question of law, or alternatively of law and fact, should be tried as a preliminary issue before the trial of the action: Whether the publication of the words complained of was absolutely privileged, and whether the publication was made under the provisions of and in accordance with the authority of the

Solicitors Act, 1957, and the Solicitors (Disciplinary Proceedings) Rules, 1957.

T. G. Roche Q.C. and *Helenus Milmo*, for the defendants, agreed that the onus of establishing absolute privilege rested on the defendants. The questions for decision are: What is the test to decide whether a body is entitled to the protection of absolute privilege? Does absolute privilege apply to the proceedings of the Disciplinary Committee of the Law Society? The law as to absolute privilege was laid down by Lord Esher M.R. in *Royal Aquarium Summer and Winter Garden Society Ltd.* v. *Parkinson*,[3] namely, that absolute immunity applies to all kinds of courts of justice and also wherever there is an authorised inquiry which, though not before a court of justice, is before a tribunal which has similar attributes. That statement of the law was adopted by Lord Atkin in *O'Connor* v. *Waldron*,[4] a Privy Council case. The inquiry claiming absolute privilege must be one authorised by law, i.e., one established and set up by law. For that reason the proceedings of a body such as the Jockey Club enjoy only qualified and not absolute privilege, for the club does not satisfy the test laid down by Lord Esher M.R. in the *Royal Aquarium* case.[5] The body claiming absolute privilege must be charged with hearing and deciding an issue, and not be concerned solely with a purely administrative duty. Thus. proceedings concerning licensing are carried out in performance of an administrative duty and do not enjoy absolute privilege. The procedures and functions of a tribunal claiming absolute privilege should be similar to those of a court of law.

The origin of the law of absolute privilege is that the higher interests of the State require for those courts and tribunals to which it is granted an atmosphere in which all do their part without fear of possible proceedings. The power of the Disciplinary Committee is concurrent with that of the Master of the Rolls and the judges to hear any applications made against a solicitor: see sections 46 and 47 of the Solicitors Act, 1957. The High Court now exercises its jurisdiction in very few cases. Thus a judge in chambers may order a solicitor to produce documents which he holds, and a judge in open court may order a solicitor to pay costs thrown away. The general power to commit a solicitor is still extant. There is an inherent absurdity in the suggestion that applications concerning a solicitor should be treated differently with regard to privilege according to whether they are heard by the court or by the Disciplinary Committee. [Reference was made to sections 3, 46, 48, 49, 50 and 55 of the Solicitors Act, 1957, and to the Solicitors (Disciplinary Proceedings) Rules, 1957.]

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[3] [1892] 1 Q.B. 431.

[4] [1935] A.C. 76; 51 T.L.R. 125.

[5] [1892] 1 Q.B. 431.

No action lies for words used maliciously by a judge or advocate: *Munster* v. *Lamb* [6]; *Royal Aquarium Summer and Winter Garden Society Ltd.* v. *Parkinson* [7]; *Lilley* v. *Roney*.[8] In the last cited case, which concerned the Solicitors Act, 1888, the question whether the proceedings were judicial or not did not arise, the only question being whether the document concerned was part of those proceedings. *Barrett* v. *Kearns* [9] established that an ad hoc committee appointed by a Bishop under the Pluralities Acts was entitled to absolute privilege. That case is important because in the *Royal Aquarium* case [10] Fry L.J. found the word "tribunal" confusing and preferred not to use it, saying that there was only absolute privilege for bodies which were in fact courts, by whatever name they were called. In *Barrett* v. *Kearns*,[11] however, Cozens-Hardy L.J.[12] approved the use of the word "tribunal." In *Copartnership Farms* v. *Harvey-Smith*,[13] which concerned a military tribunal constituted under the Military Service Act, 1916, and the regulations made thereunder, Sankey J. said [14] that the true nature of a tribunal claiming absolute privilege had to be judged on its constitution, functions and procedure. Sankey J.'s statement of the law was approved by the Court of Appeal in *Gerhold* v. *Baker*.[15]

In the present case the defendants are entitled to claim absolute privilege in respect of their findings and order because (1) the Disciplinary Committee is an inquiry authorised by statute. Under the statute and the rules made thereunder they had a duty to hear and determine the application. There was no question of the hearing being merely a domestic inquiry. (2) The attributes and functions of the committee are similar to those of a court of justice for the following reasons: (a) Its functions are in no way administrative or concerned with licensing. It is the duty of the committee to decide matters inter partes and not of its own motion, and it has to reach its own decision and not merely report to an administrative body. (b) It has power not only to strike a solicitor off the roll but to fine, and any fines imposed go to the Crown. (c) Appeal from the decision of the committee lies directly to the courts, both on findings of fact and of law. (d) Under the statute the orders of the committee are enforceable in the same way as a judgment of the High Court. (e) The jurisdiction of the committee is concurrent with that of the High Court.

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[6] (1883) 11 Q.B.D. 588.
[7] [1892] 1 Q.B. 431.
[8] (1892) 61 L.J.Q.B. 727.
[9] [1905] 1 K.B. 504.
[10] [1892] 1 Q.B. 431, 446.
[11] [1905] 1 K.B. 504.
[12] Ibid. 510.
[13] [1918] 2 K.B. 405; 34 T.L.R. 414.
[14] [1918] 2 K.B. 405, 410.
[15] [1918] W.N. 368; 35 T.L.R. 102.

As to the procedure followed by the committee in relation to the hearing of an application, the statute provides that there must be a written complaint supported by affidavit, and due and proper notice of the complaint must be given. In addition there is power to administer oaths and issue subpoenas. The proceedings of the committee are in general the same as those of a court. It has all the attributes of a court and is entitled to the privilege claimed.

The plaintiff in person. On general principles it is disputed that the Disciplinary Committee is a tribunal similar to a court of law. In the first place, the members of the committee sit in secret. Secret courts, which are anathema to all civilised societies, were abolished by Abolition of the Star Chamber Act, 1640 (16 Car. 1, c. 10). To confer absolute privilege on a secret court would be to endanger the body politic and be absolutely contrary to law and justice. The proceedings of the committee come to be secret not by Act of Parliament but by its own rules: see rule 21. The object of rules is to regulate the mechanics of proceedings, but these rules destroy the foundations of justice. All the cases in which absolute privilege has been accorded have been cases relating to public bodies. There is a misapprehension as to the effect of *Lilley* v. *Roney*.[16] When that case was decided the Disciplinary Committee had no power to strike a solicitor off the roll. It merely reported to the High Court, which then adjudicated on the matter. The present case is not covered by authority.

In a judicial inquiry the judge should be independent of the parties before him. That is not so in the case of the Disciplinary Committee. The Law Society is a private society of private gentlemen carrying on their practices as solicitors, quite properly, for gain, with their own Disciplinary Committee. The prosecuting body is part of the Law Society, as is the Disciplinary

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[16] 61 L.J.Q.B. 727.

Committee, and the clerk to that committee is employed by the prosecuting body of the Law Society by whom he is paid. Where the prosecution and the judges are so entwined, a situation arises in which the judges are also jury, prosecution and witnesses.

By the Promissory Oaths Act, 1868, every judge of a superior or inferior court of record is required to take an oath that he will administer justice. Members of military tribunals have to swear a similar oath. The members of the Disciplinary Committee take no such oath and cannot therefore claim the same privileges.

The test of whether a proceeding is a judicial proceeding or not is whether there is a rule forbidding a member of the tribunal to have an interest in the matter under consideration. There is no rule here providing that a person with an interest should not sit on the Disciplinary Committee. The danger of according absolute immunity to a committee like this can be imagined. Circumstances could arise where the practising solicitors sitting as members of the committee might have a rival appearing before them, or one of its members might at the same time be doing business with a solicitor appearing before the committee.

It is a cardinal principle of British justice that when once a person has been acquitted or convicted of an offence he shall not be charged again, but any solicitor convicted in the criminal courts, for example, of fraudulent conversion, and sentenced to prison, may be brought up before the Disciplinary Committee. It is true that the committee has no power to imprison, but it has a power to fine or strike off the roll so that in effect the solicitor is being convicted a second time for the same offence.

The Disciplinary Committee is fundamentally different from a court of law and is not entitled to claim absolute privilege. If it be held that it is so entitled, then the General Medical Council will also be entitled to do so because it is more analogous to a court of justice, its inquiries being held in public. Moreover, all sorts of little cliques will sit in private, which will make a hash of the principles of law of this country. If a body is to be accorded the protection of absolute privilege it is essential that the substantial elements of natural justice should be observed. [Reference was made to *Allbutt* v. *General Council of Medical Education and Registration*,[17] *Leeson* v. *General Council of Medical Education and Registration*,[18] O'Sullivan, The Law of Defamation (1958) and *Abbott* v. *Sullivan*.[19]]

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[17] (1889) 23 Q.B.D. 400.

[18] (1889) 43 Ch.D. 366.

[19] [1952] 1 K.B. 189; [1952] 1 T.L.R. 133; [1952] 1 All E.R. 226.

[GORMAN J. *Abbott's* case[19] has no relevance to the question of privilege.]

It is a fundamental principle of law that an accused person should be allowed to reply to allegations made against him. The defendants admit that allegations were against me in the findings and order complained of. There is no plea of justification in the defence so that the defendants have abandoned the story they published.

As to the procedure of the committee, it has no power to call witnesses or issue witness summonses. The power to compel witnesses is an important factor in deciding whether a tribunal is a judicial one or merely domestic. A court of law issues its own subpoenas. The fact that the committee has power to administer oaths is immaterial, for such a power is no criterion in this matter. [Reference was made to the Solicitors (Disciplinary Proceedings) Rules, 1957, and to Forms 9 and 10 of the Schedule.] Rule 10 empowers the committee to hear evidence on affidavit, but no court of law can hear the whole of the evidence on affidavit. Affidavits are merely preliminaries to the parties going into the witness-box. [Reference was made to the Evidence Act, 1938.] Rule 10 is completely contrary to the rules on which courts of justice are founded. Moreover, rule 27, which provides that the committee may, without finding any misconduct proved, nevertheless order any party to pay the costs of the proceedings, is inconsistent with the rules of law. It gives a power which the High Court does not itself possess: see also rules 29 and 30, which point the contrast between the practice of the Disciplinary Committee and that of the High Court. Rule 31 gives a general dispensing power to the committee in respect of requirements as to notices, affidavits, service or time which the High Court itself does not possess.

The Disciplinary Committee is in fact merely a domestic disciplinary court. It concerns people who become solicitors and who, as in a club, agree to abide by the rules of the Law Society. The fact that this small proportion of the community agrees to allow its disciplinary proceedings to be heard in private does not mean that that committee can transform its proceedings into judicial proceedings.

Even a judicial tribunal is not absolutely privileged if it acts right outside its jurisdiction. If the committee has jurisdiction to publish its findings and order, it must be outside its jurisdiction to print the pretended, fabricated evidence which is contained in the findings and order now under consideration, and no claim in respect of it can succeed. None of the cases cited by the defendants was truly analogous to the present, for they were all concerned with courts which were so described by the statutes setting them up. There is no reference anywhere in the Solicitors Act, 1957, to the Disciplinary Committee as a court. Further, all the cases cited are concerned with courts which hear cases in public so that the proceedings can be reported from day to day in the Press.

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[19] [1952] 1 K.B. 189.

The effect of according absolute privilege to any body of persons is to put them above the law, but to be above the law requires the authority of a King's court. The Disciplinary Committee is a pinchbeck court, a sham court, not comparable with a King's court which enjoys an absolute privilege descending from the Sovereign. [Reference was made to section 18 (1) of the Supreme Court of Judicature Act, 1925, section 1 (1) of the Criminal Appeal Act, 1907, and section 4 (1) of the County Courts Act, 1934.] If the defendants, in their capacity as members of the committee, are not a court in the true sense of the word, they are only entitled to qualified privilege. [Reference was made to Gatley on Libel and Slander, 4th ed. (1953), p. 183, and to *Clarke* v. *Molineux*.[20]] Even if this is a court, it is an inferior court and its privilege is lost if malice is proved: *Seaman* v. *Netherclift*,[21] *per* Cockburn C.J.[22]

Roche Q.C. in reply. As to *Seaman* v. *Netherclift*,[22] the statement on which the plaintiff relied for the proposition that the privilege of an inferior judge can be lost if malice is proved was taken from *Allardice* v. *Robertson*,[23] a Scottish case. In *Law* v. *Llewellyn*,[24] where *Seaman* v. *Netherclift*[25] was considered by the Court of Appeal, it was stated that the proposition stated in *Allardice* v. *Robertson*[26] was not the law of England and Cockburn C.J. never meant that it was. *Munster* v. *Lamb*[27] is authority for the proposition that malice is irrelevant. As to what may be called courts of law, see *Dawkins* v. *Rokeby*.[28] The sole test is, does a judicial inquiry enjoy absolute privilege or does it not? In view of *Dawkins* v. *Rokeby*,[28] it is submitted that it does.

[20] (1877) 3 Q.B.D. 237.

[21] (1876) 2 C.P.D. 53.

[22] Ibid. 58.

[23] (1830) 1 Dow & Cl.(N.S.) 495.

[24] [1906] 1 K.B. 487, 491.

[25] 2 C.P.D. 53.

[26] 1 Dow & Cl.(N.S.) 495.

[27] 11 Q.B.D. 588.

[28] (1875) L.R. 7 H.L. 744.

On the question of secrecy, the position under the rules is exactly the same as it was when the Act of 1957 was passed. Under section 88 (2) all statutory instruments under the previous Act remained in force. That included the Solicitors (Disciplinary Proceedings) Rules, 1942. When Parliament passed the Act of 1957 it must be deemed to have known perfectly well what the rules were and yet they saw fit to pass an Act providing for their continuance. In any event, the point made by the plaintiff is only relevant if the fact that a body sits in private is a bar to its being a judicial tribunal. It is submitted that that is not so. It is part of the inherent jurisdiction of a court that it should be able to sit in private when justice requires it to do so, and it is for the court to decide when to exercise that power. Thus from time to time the Court of Appeal exercises its jurisdiction to sit in private in custody matters, and the criminal courts do so in matters concerning official secrets. Normally the cases are of such a character that the decision to hold the hearing in private is made at the time by the judge or court, but there are classes of cases, such as defended nullity suits, where the rule is that the hearings should be held in camera: see section 32 (4), Matrimonial Causes Act, 1950. The power of a judge of the High Court to sit in chambers and adjourn to open court is analogous to that of the Disciplinary Committee.

These rules have to be placed before the Master of the Rolls for his concurrence, so he must have concurred in both the Rules of 1942 and 1957. He must have been satisfied that it was proper for part of the proceedings to be heard in private and that it satisfied the public weal if the findings and order of the committee were made in public. As to the independence of the judge from the parties before him, the fact that a member of the committee is a member or former member of the Council of the Law Society does not mean that he has an interest, but even if a judge does give judgment in a case in which he has an interest the decision is voidable and not void. The fact that its members are not required by the Promissory Oaths Act, 1868, to take an oath does not make the committee any less a judicial tribunal. There is nothing to prevent a solicitor adjudicating in the case of a rival. That might be urged against any part-time judge. If he has any interest or bias he should not sit. Other than that it is a matter for his own conscience. It is admitted that a person who has once been convicted should not be tried again, but that does not mean that a person punished for a criminal offence may not be open to other proceedings. A solicitor guilty of converting money may also be guilty of conduct unbefitting a solicitor. The cases of the General Medical Council and the Disciplinary Committee are not in pari materia. Even if they were, it is not accepted that the old General Medical Council was not a judicial body. [Reference was made to *Leeson* v. *General Council of Medical Education and Registration.*[29]]

There is no evidence that evidence here was wrongly admitted, and even if it were it could not affect this issue. As to the effect of section 46 (6) of the Act, the opposite inference can be drawn from the fact that the tribunal cannot issue its own subpoenas. If, as the plaintiff contends, the inference to be drawn is that this is an administrative tribunal, the committee would require powers themselves. The plaintiff's conclusion that the committee is not a judicial tribunal entails a complete misreading of history: see *Rex* v. *Wiltshire Appeal Tribunal, Ex parte Thatcher.*[30] As to the hearing of affidavit evidence, R.S.C., Ord. 37, r. (1) (A), gives complete power to the High Court to hear evidence by affidavit. The plaintiff's case on the way in which the order is pronounced is based on a complete misapprehension of rule 21. One must assume that the committee is a judicial body. If not, there is no privilege to lose. On the authority of *Munster* v. *Lamb*[31] all words written or spoken in the course of proceedings are privileged. That covers the judgment and any reasoned judgment a judge may give. If rule 21 did not exist, the members of the committee would be entitled to prepare a written judgment and deliver it in public. Any decision may be announced by a single member: see section 46 (3) of the Act of 1957. "Decision" covers the whole judgment, so no complaint can be made.

Under the Defamation Act, 1952, the privilege accorded to a person participating in a proceeding before a court of justice is different from that of a person who reports the proceedings. At common law absolute privilege attaches to the parties. Reporters have a statutory privilege under the Defamation Act, 1888, as amended by the Act of 1952, which attaches in respect of reports published fairly and accurately. *Allbutt* v. *General Council of Medical Education and Registration*[32] is irrelevant because it did not concern anything done in the course of proceedings. It is dangerous to draw an analogy between the Disciplinary Committee and the General Council of Medical Education and Registration, which was set up by charter to keep a register of medical practitioners and, when necessary, strike off. Appeal from a decision of that council lies to the Judicial Committee. The position of the Disciplinary Committee is different. It is a creature of statute and was elevated by the Act of 1919 to a tribunal with power to hear and determine disputes. Nothing that the plaintiff has said is calculated to dispute the proposition that the statement of the law by Lord Esher M.R. in the *Royal Aquarium* case [33] stands unchallenged. The Disciplinary Committee satisfies that test. Moreover, its constitution, functions and procedure conform to the rules set out by Sankey J. in *Copartnership Farms* v. *Harvey-Smith*.[34] Accordingly, it is a judicial inquiry carrying out judicial functions and as such is entitled to the privilege claimed.

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[29] 43 Ch.D. 366.

[30] (1917) 86 L.J.K.B. 121.

[31] 11 Q.B.D. 588.

[32] 23 Q.B.D. 400.

Gorman J. stated the facts and continued: In the course of the conduct of this case, from time to time words have been rather widely used in speaking of the body known as "the Law Society"; and I have pointed out that the Disciplinary Committee is a body which is constituted in accordance with the Solicitors Act, 1957, and that it is quite wrong to refer to it either as "the Law Society" or as "a committee of the Law Society."

The constitution of the statutory committee known as the Disciplinary Committee is laid down in section 46 of the Solicitors Act, 1957. [His Lordship read section 46 (1), (3), (4) of the Act and continued:] Section 47 deals with other jurisdiction conferred on the Disciplinary Committee, and section 48 deals with appeals against orders of the Disciplinary Committee. Section 49 deals with additional provisions with regard to orders of the Disciplinary Committee; and section 50 deals with the jurisdiction of the Supreme Court over solicitors, which has been referred to by Mr. Roche on behalf of the defendants in this case as "the concurrent jurisdiction."

In accordance with the power given in the Act the Solicitors (Disciplinary Proceedings) Rules, 1957, were made, which came into operation on December 31, 1957, and are in fact the rules governing the matter with which the court is concerned.

It is clear from the evidence given on behalf of the defendants that the three members of this Disciplinary Committee were properly appointed under the Act and Rules.

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[33] [1892] 1 Q.B. 431.

[34] [1918] 2 K.B. 405.

Criticism has been made by the plaintiff of a large number of the rules which govern the proceedings which have been called in issue here.

After the hearing of the application in this case there were published what have been called "findings and orders"; and I accept completely the evidence of the secretary of the committee as to the manner of their publication. The plaintiff's case is that the findings and orders of this committee so published libelled him. He says that the defence of absolute privilege does not apply, and, further, he denies that the publication was made under the provisions and in accordance with the authority of the Act and the rules made thereunder.

Mr. Roche, at the opening of this case, quite properly accepted that the onus was upon the defendants, and it is upon the submissions which he made that I have arrived at my view in this case.

It is necessary to refer to some of the authorities which Mr. Roche and the plaintiff have brought to my notice, but I do not propose to deal with all the submissions made on all those cases. I have the cases in my mind and, if I merely refer to them, it must not be taken that I am referring only to certain passages in them.

The first case to which I was referred was *Munster* v. *Lamb.*[1] That case is of importance as stating, somewhat historically, what is meant by "privilege." In that case Brett M.R. said[2]: "There have been decisions with regard to three of these classes, "namely, judges, parties and witnesses, and it has been held "that whatever they may have said in the course of an inquiry "as to the administration of the law has been said upon a "privileged occasion, and that they are not liable to any action "for libel or slander." Later he said,[3] referring to *Scott* v. *Stansfield*,[4] that it has been "held that all judges, inferior as "well as superior, are privileged for words spoken in the course "of a judicial proceeding, although they are uttered falsely and "maliciously and without reasonable or probable cause. The "ground of the decision was that the privilege existed for the "public benefit: of course it is not for the public benefit that "persons should be slandered without having a remedy; but upon "striking a balance between convenience and inconvenience, "between benefit and mischief to the public, it is thought better

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[1] (1883) 11 Q.B.D. 588.

[2] Ibid. 601.

[3] Ibid. 603.

[4] (1868) L.R. 3 Ex. 220.

"that a judge should not be subject to fear for the consequences "of anything which he may say in the course of his judicial "duty." There are other passages in the case to a like effect.

The plaintiff in this case has argued in person, and, in those circumstances, one is at all times supremely anxious that nothing should be omitted by way of argument by reason of the fact that a plaintiff is appearing in person; and evidence was admitted and expressions were used by the plaintiff seeming to impute the presence of bad faith on the part of the three defendants. For example, comment was made about the date referred to in the findings and orders of the issue of a writ; other expressions have been used such as "This was a phoney tribunal," and I allowed certain questions to be put and certain expressions to be used because I was told that they were relevant to the submission the plaintiff was making that the publication of the findings and order was not protected by absolute privilege.

Mr. Roche submitted that such evidence and such observations were irrelevant having regard to the matter to be determined in this case. I am quite satisfied that, in so far as questions were put and observations made going to the question of the bad faith of the members of this committee, they were, on the authorities, quite irrelevant and outside the matters which I have to determine. Further, I find no evidence of bad faith at all on the part of the three defendants.

The next case to which I wish to refer, which is a very important one, is *Royal Aquarium and Summer and Winter Garden Society Ltd.* v. *Parkinson.*[5] The headnote reads: "A meeting "of the London County Council for granting music and dancing "licences . . . is not a court within the meaning of the rule by "which defamatory statements made in the course of proceedings before a court are absolutely privileged."

In the course of that case the principles governing the position of courts or tribunals which are concerned with matters of the kind with which I am now concerned were set out and Lord Esher M.R. said[6]: "It was argued, in the first place, on behalf "of the defendant, that he was exercising a judicial function "when he spoke the words complained of, and therefore was "entitled to absolute immunity in respect of anything he said. "It is true that, in respect of statements made in the course of "proceedings before a court of justice, whether by judge, or "counsel, or witnesses, there is an absolute immunity from

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[5] [1892] 1 Q.B. 431.

[6] Ibid. 442.

" liability to an action. The ground of that rule is public policy. " It is applicable to all kinds of courts of justice; but the doctrine " has been carried further; and it seems that this immunity " applies wherever there is an authorised inquiry which, though " not before a court of justice, is before a tribunal which has " similar attributes. In the case of *Dawkins* v. *Lord Rokeby*[7] " the doctrine was extended to a military court of inquiry. It " was so extended on the ground that the case was one of an " authorised inquiry before a tribunal acting judicially, that is to " say, in a manner as nearly as possible similar to that in which " a court of justice acts in respect of an inquiry before it. This " doctrine has never been extended further than to courts of " justice and tribunals acting in a manner similar to that in " which such courts act." That statement by Lord Esher M.R. is of the first importance in considering the present case.

Fry L.J. made certain other observations and Lopes L.J. dealt with the wide question of absolute privilege. He said[8]: " The authorities establish beyond all question this: that neither " party, witness, counsel, jury, nor judge, can be put to answer " civilly or criminally for words spoken in office; that no action of " libel or slander lies, whether against judges, counsel, witnesses, " or parties, for words written or spoken in the course of any " proceedings before any court recognised by law, and this though " the words written or spoken were written or spoken maliciously, " without any justification or excuse." There were other passages to which I was referred by counsel, but I think I have set out sufficient to indicate the importance of that case.

Returning to the present case, much of the plaintiff's argument has been directed to putting forward the thesis that it is absurd to say that the test laid down by Lord Esher M.R.[9] applies in a case of this kind. To summarise his argument, he said, first, that this committee had not similar attributes to a court of justice, nor could it be said that it acted in a manner similar to that in which such courts act. He contested the whole position by saying that, accepting what was laid down by Lord Esher M.R.,[9] the facts in the present case show that the powers of this committee and the manner of setting it up are all quite different from those of a court of justice, and it would be wrong to apply to this committee the protection of privilege.

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[7] (1875) L.R. 7 H.L. 744.
[8] [1892] 1 Q.B. 431, 451.
[9] Ibid. 442.

The next case was *Lilley* v. *Roney*,[10] which was a case under the Solicitors Act, 1888, under which the power of the court was different from the power in the present case.

Next I was referred to *Barratt* v. *Kearns*.[11] The headnote reads: "A Commission, issued by the bishop of a diocese under "the Pluralities Act, 1838, and the Pluralities Acts Amendment "Act, 1885, to inquire into the inadequate performance of the "ecclesiastical duties of any benefice, creates a judicial tribunal, "and the occasion on which a witness gives evidence before the "Commissioners is absolutely privileged, and no action is maintainable in respect of evidence so given." The words of Lord Esher M.R. in *Royal Aquarium and Summer and Winter Garden Society Ltd.* v. *Parkinson*[12] were cited with approval by Collins M.R. in *Barratt* v. *Kearns*.[13] In view of what has been said by the plaintiff, I will refer to one matter in the judgment of Cozens-Hardy L.J.,[14] in which he dealt with the position that the evidence before the commissioners was not given upon oath.

Copartnership Farms v. *Harvey-Smith*[15] is another case of interest and some little importance. That was decided by Sankey J., and it was considered in the later case of *Gerhold* v. *Baker*.[16] The headnote reads: "The local military tribunal constituted "under the Military Service Act, 1916, and the Military Service "Regulations (Amendment) Order, 1916, and the regulations "annexed thereto is a judicial body and defamatory statements "made by a member in the course of proceedings before it are "absolutely privileged."

Sankey J., who dealt with the matter I am considering in this case, said[17]: "A number of cases have been cited, but in my "opinion there cannot be any controversy upon the principle of "law which is applicable to the present case. The principle I "conceive to be this, that where a tribunal is a court of justice, "or a body acting in a manner similar to that in which a court "of justice acts, any statement made by a member thereof is "absolutely privileged and no action can be brought thereon." He then approached the question in a different manner by putting to himself this question[18]: "The question which I have to decide "is, therefore, under which category does this local tribunal fall? "Does it come within that which I may describe shortly as a

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[10] (1892) 61 L.J.Q.B. 727.
[11] [1905] 1 K.B. 504.
[12] [1892] 1 Q.B. 431, 442.
[13] [1905] 1 K.B. 504, 510.
[14] Ibid. 511.
[15] [1918] 2 K.B. 405; 34 T.L.R. 414.
[16] [1918] W.N. 368; 35 T.L.R. 102.
[17] [1918] 2 K.B. 405, 408.
[18] Ibid. 409.

"judicial tribunal, or does it come within a purely administrative "tribunal?" The plaintiff has urged before me in the present case that this committee is a purely domestic tribunal exercising administrative functions amongst the profession of solicitors, and to say that it is a judicial tribunal is wrong.

In *Copartnership Farms* v. *Harvey-Smith* [19] Sankey J. dealt with the matter by referring to three heads, the constitution, the functions, and the procedure of the tribunal; and in the course of the judgment, in considering the true nature of the tribunal, he directed his mind to those three matters. Having dealt with them, he came to the view that the tribunal was in fact a judicial body and that the proceedings were absolutely privileged.

The next case was *Gerhold* v. *Baker*,[20] which was a case in the Court of Appeal. Bankes L.J. said that the contention made in that case that the occasion was absolutely privileged was not well founded, and then went on to say [21]: "The law was well established, and was accurately stated by Sankey J. in *Copartnership* "*Farms* v. *Harvey-Smith*,[22]" and then he read out and cited with approval the words I have just read from the judgment of Sankey J. in that case.

The next case was *O'Connor* v. *Waldron*.[23] That was an inquiry under the Combines Investigation Act, and was a Privy Council case. It was held that the inquiry was not an absolutely privileged occasion. Lord Atkin quoted with approval Lord Esher M.R. in the *Royal Aquarium* case.[24] He said [25]: "In their "Lordships' opinion the law on the subject was accurately stated "by Lord Esher in *Royal Aquarium, etc.* v. *Parkinson*,[26] where "he says that the privilege 'applies wherever there is an autho"'rised inquiry which, though not before a court of justice, is "'before a tribunal which has similar attributes. . . . This "'doctrine has never been extended further than to courts of "'justice and tribunals acting in a manner similar to that in "'which such courts act.'"

The decision in that case was against the application of absolute privilege. Lord Atkin said that the Judicial Committee negatived a contention in an earlier case, *Proprietary Articles Trade Association* v. *Attorney-General for Canada*,[27] and went on [28]:

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[19] [1918] 2 K.B. 405, 410.
[20] [1918] W.N. 368.
[21] Ibid. 369.
[22] [1918] 2 K.B. 405, 408.
[23] [1935] A.C. 76; 51 T.L.R. 125.
[24] [1892] 1 Q.B. 431, 442.
[25] [1935] A.C. 76, 81.
[26] [1892] 1 Q.B. 431, 442.
[27] [1931] A.C. 310; 47 T.L.R. 250.
[28] [1935] A.C. 76, 82.

"It seems clear from the judgment that they came to the conclusion that the sections dealing with the investigations by commissioners and others were merely administrative machinery "for inquiry whether offences had been committed," thereby putting another facet on the distinction between a judicial inquiry and an administrative inquiry.

Other authorities were referred to later, and I shall deal with them in their order. Based on those authorities, the submission made on behalf of the defendants was that the committee was not an administrative tribunal; it was an authorised inquiry; it was by nature of a judicial inquiry; and that, as such, it was not merely performing administrative functions and it was right that its findings should be protected by absolute privilege. I do not intend to go through all the references made by Mr. Roche to various sections of the Solicitors Act, 1957, and to the rules; I have them in my mind. Having regard particularly to the fact that the plaintiff conducted his case in person I shall quite shortly set out his submissions on certain sections of the Act and rules.

The submissions he made were these. He did not dissent from the principles to be applied as laid down in the authorities to which I have referred, but he argued that the tribunal had to be equivalent to a court of law, acting in a similar manner and with similar attributes. Putting that forward as a general principle, he said that on consideration of the authorities, it would not be right to say that this committee was a tribunal to which the protection of absolute privilege should be attached. He said, first, that the difficulty in the way of the defendants' case was that rule 21 of the Solicitors (Disciplinary Proceedings) Rules, 1957, provides that the committee shall hear all applications in private; and he dealt with the question of secrecy as a strong factor against the defendants' argument that absolute privilege applied. He said that in judicial tribunals the judge should be independent; the judge should take an oath. He said that the test to be applied in deciding whether or not proceedings are judicial proceedings is the rule which forbids tribunals to have a self-interest. He said that there ought not to be two possible convictions and the fact that section 50 of the Act of 1957 gives what Mr. Roche has referred to as the concurrent jurisdiction of the court over solicitors, shows that the first proceedings under the Act and Rules are intended to be purely administrative, and that it would not be right to say that here were two judicial tribunals exercising concurrent jurisdiction. The plaintiff then referred to *Leeson* v. *General Council of Medical Education and Registration*,[29] to Richard O'Sullivan on the Law of Defamation (1958) and to *Abbott* v. *Sullivan*.[30] He said that one of the fundamental principles of justice was that a person should be allowed to reply to allegations. That goes to the question of the good faith of the tribunal. It would appear that the plaintiff made an application to appear before the committee and give evidence, but that was not allowed by the committee. I have already dealt with that matter.

Continuing his argument, the plaintiff said that the question whether the committee is a domestic tribunal has to be decided on the particular facts of the particular case; and, if there is any doubt, the immunity given by the doctrine of absolute privilege should not be extended. He commented upon the fact that the committee had no power to compel witnesses; that subpoena could not be issued by the committee, but only by persons appearing before the committee. He also dealt with affidavit evidence; and with rules 27, 29, 30 and 31; and he submitted that in substance this committee is not substantially judicial but is a domestic disciplinary court to be likened to that of a club. He also referred to the Evidence Act, 1938, in view of the provision in rule 34 that "the Evidence Act, 1938, "and the Evidence and Powers of Attorney Act, 1940, shall "apply in relation to proceedings before the committee in the "same manner as they apply in relation to civil and criminal "proceedings."

The plaintiff also submitted that there is another matter for consideration in that it is laid down in rule 21 that the committee "shall hear applications in private, but shall pronounce their "Findings and Orders in public"; and he contended that the committee, by having published its findings and order in the manner in which they were published, had gone beyond its jurisdiction. He also said that nowhere in the Act or Rules does the word "court" appear in relation to this committee, and that it was a sham court. He referred to *Seaman* v. *Netherclift*,[31] in which *Allardice* v. *Robertson*,[32] a Scottish case, was not disapproved. I say no more about *Seaman* v. *Netherclift*,[33] because it was discussed in a later case, *Law* v. *Llewellyn*,[34]

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[29] (1889) 43 Ch.D. 366.
[30] [1952] 1 K.B. 189; [1952] 1 T.L.R. 133; [1952] 1 All E.R. 226.
[31] (1876) 2 C.P.D. 53.
[32] (1830) 1 Dow & Cl. 495.
[33] 2 C.P.D. 53.
[34] [1906] 1 K.B. 487.

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in which it was said that the earlier Scottish case never was the law of this country.

The plaintiff referred to the Defamation Act, 1952, and summarised his case in this way: At the highest, this is an internal administrative tribunal administering discipline in private within a private profession to members of this profession, with power limited to fining, striking off the roll of solicitors or suspending their certificates, and that these matters are purely domestic matters and are not such matters as would make the committee into a court approximating to a court of law. He referred to *Allbutt* v. *General Council of Medical Education and Registration*,[35] to the Perjury Act, 1911, and said that it was dangerous to extend immunity, which would be done by saying that this committee had the doctrine of absolute privilege attached.

I do not propose to go through the rest of the plaintiff's submissions. I have his submissions, the regulations, and the Act all in my mind. The matters with which the plaintiff dealt were referred to by Mr. Roche in his reply, and I have had the benefit of a very full argument on both sides.

Bearing in mind the fact that the onus is on the defendants, I have to decide which of the contentions is right, and I have no doubt, having thought over the matter carefully, having considered the authorities and the submissions, that the submissions made by the defendants are right. Having regard to that which is submitted to me in the order under question, I am clearly of the opinion that the publication of the words complained of was absolutely privileged, and that it was made under the provisions of and in accordance with the authority of the Solicitors Act, 1957, and the Solicitors (Disciplinary Proceedings) Rules, 1957. Having regard to all the submissions made to me, I have no doubt that that is a right decision.

Judgment for defendants with costs. No order as to leave to appeal. Stay of execution as to costs for 21 days and thereafter pending hearing of appeal, if notice given within 21 days. By consent stay all further proceedings in Addis v. *Bateson,* 1959 *No.* 667, *pending hearing of appeal in this action or further order.*

Solicitors: *Charles Russell & Co.*

E. M. W.

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[35] (1889) 23 Q.B.D. 400.

BARNET GROUP HOSPITAL MANAGEMENT COMMITTEE v. EAGLE STAR INSURANCE CO. LTD.

1959
July 2, 30.

Salmon J.

[1958 B. No. 1768.]

Road Traffic—Third party insurance—Hospital expenses—Policy covering voluntary passengers in addition to persons compulsorily insured—Passenger injured—Payment made by insurers to passenger—Whether made under or in consequence of policy issued under Part II of Road Traffic Act, 1930*—Hospital treatment received by passenger before date of payment to him and without knowledge of insurers—Whether hospital entitled to recover from insurers expenses incurred—" Any person "—Road Traffic Act,* 1930 (20 *&* 21 *Geo.* 5, *c.* 43), *s.* 36 (1) (*b*) (2), *as substituted by Road and Rail Traffic Act,* 1933, (23 *&* 24 *Geo.* 5, *c.* 53), *s.* 33.

A voluntary passenger in a motor-car was injured in a road accident and received treatment as an in-patient in a hospital administered by the plaintiffs under the National Health Service Acts. At the time of the accident the owner-driver of the car held a policy of insurance issued by the defendants insuring him against all liability as required by section 36 (1) (*b*) of the Road Traffic Act, 1930,[1] and also against liability to voluntary passengers in his car. The defendants made a payment to the passenger under the policy in respect of his injuries. At the time of such payment they were unaware that he had received hospital treatment but the fact that he had came to their knowledge before the issue of the writ in this action in which the plaintiffs, a hospital management committee, sought to recover from the defendants the expenses incurred by the hospital by virtue of section 36 (2) of the Act of 1930, as substituted by section 33 of the Road and Rail Traffic Act, 1933.[2] The defendants denied liability:—

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[1] Road Traffic Act, 1930, s. 36 (1): " In order to comply with the " requirements of this Part of this " Act [Part II], a policy of insurance " must be a policy which—(*a*) is " issued by a person who is an autho- " rised insurer within the meaning of " this Part of this Act; and (*b*) in- " sures such person, persons or classes " of persons as may be specified in " the policy in respect of any liability " which may be incurred by him or " them in respect of the death of or " bodily injury to any person caused " by or arising out of the use of the " vehicle on a road: Provided that " such a policy shall not be required " to cover . . . (ii) except in the case " of a vehicle in which passengers are " carried for hire or reward or by " reason of or in pursuance of a con- " tract of employment, liability in " respect of the death of or bodily " injury to persons being carried in " or upon or entering or getting on " to or alighting from the vehicle at " the time of the occurrence of the " event out of which the claims " arise. . . ."

[2] Road and Rail Traffic Act, 1933, s. 33: " Section 36 of the Road " Traffic Act, 1930 (which relates to " requirements in respect of policies " of insurance) shall be amended by " substituting for subsection (2) there- " of the following subsection:—' (2) " ' Where any payment is made " ' (whether or not with an admission

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BARNET GROUP HOSPITAL MANAGEMENT COMMITTEE
v.
EAGLE STAR INSURANCE CO. LTD.

Held, (1) that the policy issued by the defendants was a policy issued under Part II of the Road Traffic Act, 1930, notwithstanding that it included cover in respect of an additional liability to that required by section 36 (1), and, accordingly, the payment made by them to the passenger was a payment made under or in consequence of a policy issued under the Act.

(2) That the provisions of section 36 (2) of the Act of 1930 (as substituted by section 33 of the Act of 1933) relating to payment made by an authorised insurer to "any person," could not be confined to persons compulsorily insured but included voluntary passengers and the expenses of their treatment in hospital.

Royal Victoria Hospital v. *London Guarantee and Accident Corporation* [1937] N.I. 64 applied.

But (3) that in order for any liability to fall on insurers in respect of hospital treatment, the insurers must have had knowledge of such treatment before making payment to the third party, and as the defendants had no knowledge of the treatment by the hospital before they made the payment to the passenger they were under no statutory obligation to pay the plaintiffs the expenses incurred in such treatment.

ACTION.

The following statement of facts is taken substantially from the judgment: On January 28, 1955, one George Groom, while travelling as a passenger in a motor-car owned and driven by one Boost, sustained certain bodily injuries. He was taken to the Barnet General Hospital, which was administered by the plaintiffs, the Barnet Group Hospital Management Committee, under the National Health Service Acts, where he received treatment as an in-patient until he was discharged on February 2, 1955. The hospital reasonably incurred expenses of £12 12s. 6d. At the time of the accident the owner and driver of the car was insured with the defendants, Eagle Star Insurance Co. Ltd., in respect of the use of his motor-car against all such liability as required to be covered by section 36 (1) (*b*) of the Road Traffic Act, 1930, and also against liability to voluntary passengers travelling in his motor-car. The defendants made a payment to Groom

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" 'of liability) by—(*a*) an authorised " 'insurer under or in consequence of " 'a policy issued under this Part of " 'this Act; . . . in respect of the death " 'of or bodily injury to any person " 'arising out of the use of a motor-" 'vehicle on a road or in a place to " 'which the public have a right of " 'access, and the person who has so " 'died or been bodily injured has to " 'the knowledge of the authorised " 'insurer . . . received treatment at " 'a hospital . . . in respect of " 'the injury so arising, there shall " 'also be paid by the authorised in-" 'surer . . . to such hospital the " 'expenses reasonably incurred by " 'the hospital in affording such " 'treatment, . . .' "

under the policy in respect of his injuries. At the time they made the payment they did not know that Groom had been treated in hospital, although they knew of that fact before the issue of the writ in this action in which the plaintiffs claimed that they were entitled to recover from the defendants the expenses they had reasonably incurred in treating Groom. They relied on section 36 (2) of the Road Traffic Act, 1930, as substituted by section 33 of the Road and Rail Traffic Act, 1933, and applied by Schedule 10 of the National Health Service Act, 1946.

In their statement of claim the plaintiffs contended that the policy issued by the defendants to the owner and driver of the car was a policy issued under Part II of the Road Traffic Act, 1930, within the meaning and effect of section 36 (2) thereof (as substituted by section 33 of the Act of 1933), and that the defendants, with knowledge that Groom had received treatment at a hospital, made a payment to him under or in consequence of that policy; that the defendants were indebted to the plaintiffs in the amount of expenses they had reasonably incurred but, despite demand, had refused to pay the amount demanded. They accordingly claimed the sum of £12 12s. 6d.

The defendants admitted the payment made to Groom but denied knowledge that he had received hospital treatment at the date that payment was made, but admitted such knowledge before the issue of the writ. They expressly denied that the payment made to Groom was a payment made by them under or in consequence of a policy issued under Part II of the Road Traffic Act, 1930, or that Groom was " any person " within the meaning of those words in section 36 (2) of that Act as substituted by section 33 of the Act of 1933. They contended that they had no right or duty in law to pay to the plaintiffs the sum demanded by them.

By their reply the plaintiffs contended that if the defendants acquired knowledge of the hospital treatment received by Groom after and not before making payment to him nevertheless, by reason of their knowledge at the date of the issue of the writ in this action, they were indebted to the plaintiffs in the sum claimed.

J. R. Cumming-Bruce for the plaintiffs. The question is whether the protection afforded to a hospital by section 36 (2) of the Road Traffic Act, 1930 (as substituted by section 33 of the Road and Rail Traffic Act, 1933), which enables the hospital to claim against the insurer in respect of treatment given to persons injured in road accidents, extends to the case of a voluntary passenger in respect of whom the insurer has accepted liability under a policy which also covers all the liabilities required to be covered by the Act. This is the first case in England in which this point has been raised. In the past reliance appears to have been placed by insurers on a Scottish case, *Lockerbie* (or *Cant*) v. *Eagle Star and British Dominions Insurance Co. Ltd.*,[3] in support of the view put forward by the defendants that they are under no statutory liability in such cases, but it is difficult to see that *Lockerbie's* case [3] is relevant to the point.

It is submitted that on the words of the subsection the contingencies which give rise to the liability of an insurer are: Did the authorised insurer make a payment to the insured person under a policy issued under Part II of the Road Traffic Act, 1930? Was the insured person treated in hospital to the knowledge of the insurer? It is submitted that in the present case both those contingencies have been fulfilled.

The relevant sections of the Road Traffic Acts, 1930 and 1933, which have to be read and construed together as one Act, give rise to three quite different kinds of protection, (a) protection to insured persons, as to which various conditions are laid down, (b) protection to hospitals, so that when they treat persons injured in road accidents they shall not be at risk in respect of their proper charges, (c) protection for doctors who give emergency treatment to persons hurt on the road. The right created by statute is to recover against the user of the vehicle. The three different kinds of protection were brought into existence to deal with different kinds of mischief. Such obscurity as attaches to the problem now under consideration arises from the fact that by an inelegance of drafting the third party protection and the protection afforded to hospitals are embodied in the same section, section 36, although they are in different subsections. That can give rise to the view put forward by the defendants that in spite of the clear words of the section there must be read into it words which will limit the protection it affords to hospitals to cases where treatment is given to persons compulsorily insured.

As to whether a payment has been made by an authorised insurer under a policy issued under or in consequence of the Act, the policy now under consideration clearly covers all the categories required to be covered by sections 35 (1) and 36 (1) of the Act of 1930 and also persons who *may* be covered. It also includes a clause providing for the payment of reasonable medical expenses. There is nothing on the face of the policy or in its conditions which place it outside the Act, and it is submitted that it is a policy issued under Part II of the Act. It does not cease to be a policy so issued because it includes in its cover additional indemnities, e.g., in respect of voluntary passengers, which are not required by the Act to be met but which may be met. That submission is fortified by the fact that the certificate of insurance states that the policy is issued in accordance with the Act.

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[3] Unreported, Court of Session, March 18, 1937.

The words " any person " in section 36 (1) mean " any person " and not " any persons within the classes required to be " covered by the subsection." The words " any person " are as wide as can be and there is no reason for limiting their meaning unless strong reasons can be adduced for so doing. Had it been the intention of the legislature to limit the right of hospitals to recover payment in respect of persons within the classes required to be covered by section 36 (1), words to that effect would have been used. This point was considered by the Court of Appeal in Northern Ireland in *Royal Victoria Hospital* v. *London Guarantee and Accident Corporation.*[4] That case was exactly on this point. Reliance is placed on the views expressed in the judgments of Andrews and Best L.JJ. The words of the Northern Ireland statute are very close to those used in the English Act. The only difference, which is not material, is that the protection afforded to the hospitals is dealt with in a separate subsection, but for all relevant purposes the Irish Court of Appeal was considering exactly the same problem as the court has to consider here. The court should adopt the reasoning of Andrews L.J.,[5] which supports the plaintiffs' submission here. It is true that Moore C.J.[6] took the opposite view, but it is submitted that he was so anxious not to extend the remedy given by the statute that he cut it down too far. There is no ground for an artificial restriction of the plain words of the subsection. Parliament has not enacted that payment is to be made in connection only with a liability arising under the Act, and there would have to be the plainest indication within or outside the Act that the provisions related only to third parties compulsorily required to be insured to permit the court to modify the plain meaning of the words " any person."

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[4] [1937] N.I. 64.

[5] Ibid. 77.

[6] Ibid. 74.

As to the knowledge of the insurers of the treatment given, it is clear that they had the requisite knowledge at an early date and certainly before the writ in this action was issued. That is sufficient to comply with the requirements of the statute.

Gerald Gardiner Q.C. and *Michael Lee* for the defendants. It is conceded that having regard to the terms of the policy and to the certificate of insurance this was a policy issued under and in consequence of Part II of the Road Traffic Act, 1930. As to the knowledge of the insurer, section 36 (2) is clearly worded. It refers first to " where any payment is made." It then goes on to provide that " the person who has . . . received treatment " at a hospital. . . ." That must mean that a hospital has no right to recover from the insurer in cases where treatment is given after payment has been made. Further, the words " to the " knowledge of the authorised insurer " are embodied in a sentence which is drafted in the perfect tense. If it be right that treatment must have been received before payment is made, equally the knowledge of the insurer must have preceded the payment. If that submission be accepted, nothing else arises in the present case.

Royal Victoria Hospital v. *London Guarantee and Accident Corporation*[7] is based almost entirely on section 7 (1) (*c*) of the Irish statute. In the view of Best L.J. the plaintiff's argument was correct because of the presence of that subsection. There is no equivalent subsection in the English Act, and therefore the decision of the Irish Court of Appeal cannot affect this matter.

The statutory liability on the authorised insurer to pay the hospital in respect of hospital treatment given to an injured person only attaches where there is a statutory liability to insure that person or class of persons. One must have regard to section 35 of the Act of 1930. The legislature only obliges a motorist to insure against certain risks; and it is submitted that the Act does not apply in the case of a liability voluntarily accepted by an insurance company. An injured person, if a voluntary passenger, has no right to proceed directly against the insurance company in the way that other persons have who are required by law to be covered by insurance. It would be contrary to common sense to say that a hospital can proceed against the insurance company while the injured passenger cannot.

As to the meaning of the words " any person " in section 36 (2), those words must be construed to mean " any person required

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[7] [1937] N.I. 64.

"to be covered by the Act." The legislature may have thought that that was so clearly the meaning of the words "any person" that it was not necessary to add the additional words. *Lockerbie* (or *Cant*) v. *Eagle Star and British Dominion Insurance Co. Ltd.*[8] does not assist the court on the construction of section 36 (2).

Cumming-Bruce in reply. As to the words "where any "payment is made" in section 36 (2), the present tense is not grammatically correct to describe a condition precedent. Those words should be read to mean "where a payment shall in future "be made." The defendants have fastened on a grammatical error to persuade the court to point the contrast between the date of payment and the giving of hospital treatment. The court should hesitate before placing a construction on a subsection of an Act which is based on the use of different tenses. If the defendants' submission is correct, an insurer could defeat the statute by making a payment to a person before hospital treatment is given to defeat the hospital's claim. The words "to the "knowledge of the insurer" have been inserted because it would not be reasonable to create a legal liability of which the insurer has not been notified, but it is submitted that for the hospital to avail itself of the relief claimed it is sufficient if notice of its claim is given before the issue of the writ. One of the objects of the Act is to afford protection for hospitals. To give effect to the construction contended for by the defendants further words would have to be written into the subsection.

Cur. adv. vult.

July 30. SALMON J. stated the facts, and continued: The case turns largely upon the construction of section 33 of the Road and Rail Traffic Act, 1933. [His Lordship read the section.] The first question for decision is whether the payment by the defendants (who admittedly are authorised insurers within the meaning of the Act) is a payment in consequence of a policy issued under the Act. There can be no doubt that the payment was made under the policy of insurance dated March 3, 1955. Was this a policy issued under Part II of the Road Traffic Act, 1930?

Section 35 (1) of that Act reads as follows: "Subject to the "provisions of this Part of this Act, it shall not be lawful for any "person to use, or to cause or permit any other person to use, a

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[8] Unreported.

"motor vehicle on a road unless there is in force in relation to "the user of the vehicle by that person or that other person, as "the case may be, such a policy of insurance . . . in respect of "third-party risks as complies with the requirements of this Part "of this Act."

Section 36 (1) of the same Act reads as follows: "In order "to comply with the requirements of this Part of this Act, a "policy of insurance must be a policy which—(*a*) is issued by a "person who is an authorised insurer within the meaning of this "Part of this Act; and (*b*) insures such person, persons or classes "of persons as may be specified in the policy in respect of any "liability which may be incurred by him or them in respect of "the death of or bodily injury to any person caused by or arising "out of the use of the vehicle on a road: Provided that such a "policy shall not be required to cover . . . (ii) except in the "case of a vehicle in which passengers are carried for hire or "reward or by reason of or in pursuance of a contract of employ-"ment, liability in respect of the death of or bodily injury to "persons being carried in or upon or entering or getting on to or "alighting from the vehicle at the time of the occurrence of the "event out of which the claims arise." Section 36 (5) provides: "A policy shall be of no effect for the purposes of this Part of this "Act unless and until there is delivered by the insurer to the "person by whom the policy is effected a certificate (in this "Part of this Act referred to as a 'certificate of insurance') in "the prescribed form and containing such particulars of any "conditions subject to which the policy is issued and of any other "matters as may be prescribed. . . ."

It seems to me beyond argument that the policy in question is a policy issued under Part II of the Road Traffic Act, 1930. It is true that it includes cover in respect of liability in respect of death or bodily injury of passengers which it is not required to include by section 36 (1). I can, however, see no reason why a policy which gives the cover required by the Act and complies with all the requirements of the Act fails to qualify as a policy issued under the Act merely because it includes cover beyond that made compulsory by the Act. The language of the proviso strongly supports this view. The words: "Pro-"vided that such a policy shall not be required to cover," seem to envisage that such a policy may cover liability in respect of voluntary passengers, although it need not do so. It is also to be observed that the certificate of insurance, which is in the prescribed form, states that the policy is issued in accordance with the provisions of the Act. Accordingly, in my view, the payment to Groom was made by an authorised insurer under a policy issued under Part II of the Road Traffic Act, 1930.

The next question is whether or not Groom was "any "person" within the meaning of section 36 (2). Prima facie, Groom clearly is "any person." Mr. Gardiner, on behalf of the defendants, argues, however, that "any person" means any person of the class required to be covered by the Act. Why should the court give such a limited construction to the meaning of the words "any person"? In my view, such a construction involves writing words into the statute which are not there. If the legislature had intended the payment mentioned in section 36 (2) to be confined to persons of the class required to be covered by the Act, it could have expressed that intention in plain language. Indeed, where the legislature does intend to confine the operation of the Act to such liability as is required to be covered by the Act, it expresses that intention clearly. See, for example, sections 10 and 11 of the Road Traffic Act, 1934. In my judgment, the words "where any payment is made by an "authorised insurer under a policy issued under any Part of this "Act to any person" are as wide as they can be, and I can see no reason for cutting down their meaning.

I think Mr. Cumming-Bruce is right when he suggests that the object of Parliament in passing the Road Traffic Acts was to protect not only persons injured in motor-car accidents but also the hospitals who treat such persons for their injuries. I can see no reason why the provisions of section 36 (2) should be confined to persons compulsorily insured and exclude voluntary passengers. The hospital treatment is no less valuable to the voluntary passengers than it is to any other third parties. Moreover, the insurers obviously benefit as much from the treatment of a voluntary passenger as they do from the treatment of any other third party. But for such treatment injuries would have graver consequences and, accordingly, damages payable by the insurers would be higher. I hold that the words "any person" in section 36 (2) include voluntary passengers.

Although, curiously enough, there is no authority on this point in England, I am supported in the view I have formed by the majority judgments of the Court of Appeal in Ireland in *Royal Victoria Hospital* v. *London Guarantee and Accident Corporation.*[1]

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[1] [1937] N.I. 64.

I have thought it right, out of respect for the careful arguments I have heard, and because this case may well go further, to express my conclusions on the points with which I have already dealt. These conclusions cannot, however, affect the result of this case having regard to the view I have formed on the other point with which I will now deal.

The plaintiffs' difficulty in this case arises out of the words in section 36 (2): "Where any payment is made . . . (*a*) an "authorised insurer under or in consequence of a policy issued "under this Part of this Act . . . in respect of . . . bodily injury "to any person arising out of the use of a motor vehicle on a "road . . . and the person who has so . . . been bodily injured has "to the knowledge of the authorised insurer . . . received treat"ment at a hospital . . . in respect of the injury so arising, "there shall also be paid by the authorised insurer . . . the "expenses reasonably incurred by the hospital in affording such "treatment. . . ." The strict grammatical interpretation of the words of the statute which I have read is that in order for any liability to fall upon the insurers in respect of hospital treatment, the insurers must have knowledge of the treatment before paying the third party. This is conceded by Mr. Cumming-Bruce, who argues, however, that there is an obvious grammatical mistake on the part of the draftsman. He invites me, in effect, to rewrite the section—an invitation which, however attractive Mr. Cumming-Bruce makes it sound, I find myself compelled to decline. It is easy to see why Parliament should have required that the insurers' knowledge of the hospital treatment should precede payment to third parties for that payment to render them liable for those expenses. Many thousands of claims by third parties are settled each year by insurance companies. In assessing the value of the claim it is important for the insurers to appreciate their possible total liability. For example, it might be thought that the most a claim was worth in order to avoid litigation was £x. If the hospital expenses are £y, the insurers, with knowledge of the hospital treatment, would settle the claim on the basis of paying the third party £x minus £y and paying the hospital £y. It would be a hardship if, after paying the whole sum of £x to the third party in ignorance of his having received hospital treatment, the insurers should have to pay out a further £y in respect of such treatment. There seems to me to be no reason for the legislature to insert in section 36 the provision as to knowledge of the hospital treatment unless the knowledge is to precede the payment to the third parties. Mr. Cumming-Bruce suggests that the knowledge need precede only the issue of the writ, and that the object of the legislature was to prevent a writ being issued by the hospital against the insurer before the insurer had received notice of the hospital treatment. Ingenious as this argument may be, it does not carry conviction to my mind. It seems to me inconceivable that any hospital which had a statutory right to recover its expenses against an authorised insurer would go to the trouble and expense of issuing a writ without first asking the insurer to discharge his statutory obligation. I cannot think that Parliament inserted words in a statute merely to guard against an eventuality which no reasonable man would consider in the least likely to arise.

Accordingly, since it is admitted that the defendants in this case did not know of the hospital treatment until after they made their payment to Groom, they are under no statutory obligation to pay the expenses of that treatment to the plaintiffs. There will, accordingly, be judgment for the defendants.

Judgment for defendants with costs.

Solicitors: *Merton Jones, Lewsey & Jefferies; Simmons & Simmons.*

E. M. W.

HANCOCK *v.* PRISON COMMISSIONERS.

[1959 H. No. 2107.]

1959
Sept. 18.

Winn J.

Criminal Law—Court of Criminal Appeal—Substitution of sentence—Effect—Sentence quashed and shorter sentence substituted therefor—Whether disabilities attaching to quashed sentence continue to attach to substituted sentence—Meaning of "quash"—Former sentence not void ab initio—Lost remission—Criminal Appeal Act, 1907 (7 *Edw.* 7, *c.* 23), *s.* 4 (3)—*Prison Act,* 1952 (15 *&* 16 *Geo.* 6 *&* 1 *Eliz.* 2, *c.* 52), *s.* 25 (1)—*Prison Rules,* 1949 (*S.I.* 1949, *No.* 1073)—*Prison Rules,* 1952 (*S.I.* 1952, *No.* 1405), *r.* 3.

Criminal Law—Sentence—Remission—Effect of reduction of sentence on appeal.

The Criminal Appeal Act, 1907,[1] by section 4 (3), provides: "On an appeal against sentence the Court of Criminal Appeal

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[1] Criminal Appeal Act, 1907, s. 4 (3): "On an appeal against sentence "the Court of Criminal Appeal shall, "if they think that a different sen-"tence should have been passed, "quash the sentence passed at the

"shall, if they think that a different sentence should have been "passed, quash the sentence passed at the trial, and pass such "other sentence warranted in law by the verdict . . . in substitution "therefor as they think ought to have been passed. . . ."

By the Prison Act, 1952, section 25 (1),[2] it is provided that rules made under the Act may make provision whereby "a person serving "a sentence of imprisonment . . . may be granted remission of such "part of that sentence as may be prescribed by" the rules on the ground of his industry and good conduct; and the Prison Rules, 1949, as amended by rule 3 of the Prison Rules, 1952,[3] provide that "arrangements shall be made by which a prisoner serving a "sentence of imprisonment . . . may by good conduct and industry "become eligible for discharge when a portion of his sentence not "exceeding one-third of the whole sentence has yet to run: . . ."

The plaintiff was sentenced on January 11, 1955, to 10 years' imprisonment. During the first years of his imprisonment he suffered losses of remission of sentence amounting to 848 days for acts contrary to good conduct and industry in prison. In 1957 he was granted leave to appeal out of time against his sentence; and on October 14, 1957, the Court of Criminal Appeal quashed the 10-year sentence and passed in substitution therefor a sentence of seven years' imprisonment.

The plaintiff was thereafter continuously of good conduct and industry, and, accordingly, when approaching the date (September 10, 1959), when one-third of his seven-year sentence had yet to run, he inquired as to his eligibility for release on that date with remission of the remainder of his seven-year sentence in accordance with the rules. The prison commissioners replied that they held him under a 10-year sentence varied on appeal to seven years; that the 848 days' loss of remission in respect of the quashed sentence

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"trial, and pass such other sentence "warranted in law by the verdict "(whether more or less severe) in "substitution therefor as they think "ought to have been passed, and in "any other case shall dismiss the "appeal."

[2] Prison Act, 1952, s. 25 (1): "Rules made under section forty-"seven of this Act may make provi-"sion whereby, in such circumstances "as may be prescribed by the rules, "a person serving a sentence of "imprisonment for such a term as "may be so prescribed may be "granted remission of such part of "that sentence as may be so pre-"scribed on the ground of his indus-"try and good conduct, and on the "discharge of a person from prison in "pursuance of any such remission as "aforesaid his sentence shall expire."

[3] Prison Rules, 1952 (S.I. 1952, No. 1405), r. 3: "For rule 37 of the "principal rules" (S.I. 1949, No. 1073) "there shall be substituted the "following rule:—37. Arrangements "shall be made by which a prisoner "serving a sentence of imprisonment, "whether by one sentence or by con-"secutive sentences, for a period "exceeding one month, including a "person committed to prison in de-"fault of payment of a sum adjudged "to be paid by a conviction, may by "good conduct and industry become "eligible for discharge when a portion "of his sentence not exceeding one-"third of the whole sentence has yet "to run: Provided that nothing in "the said arrangements shall autho-"rise the reduction of any period of "imprisonment to a period less than "thirty-one days."

continued to subsist in respect of the substituted seven-year sentence; and that, accordingly, he was not eligible nor due for release until January 6, 1962. They intimated that the appropriate authority would consider any application on his behalf for the mitigation or remission of part of the losses of remission.

On a claim by the plaintiff for declarations (1) that he was eligible for release on September 10, 1959, and (2) that he had not lost or forfeited any remission of the sentence he was then serving, the prison commissioners took no objection to the court expressing an opinion on the preliminary point as to the effect of quashing a sentence under the Criminal Appeal Act, 1907:—

Held, that the word "quash" in section 4 (3) of the Act of 1907 did not mean to make null and void ab initio, but only for the future, from the moment when the Court of Criminal Appeal decided to quash the former sentence and substitute therefor a different sentence; accordingly, it was immaterial, for the purposes of consideration by the prison commissioners of his eligibility for discharge under the rules, whether the plaintiff was serving the 10-year or the seven-year sentence when losses of remission were imposed on him; and the question whether or not he was eligible for discharge before the expiration of the seven-year sentence remained a matter within the unfettered discretion of the prison commissioners.

ACTION.

The plaintiff, Ronald Arthur Hancock, was sentenced on January 11, 1955, at the County of Lancaster Quarter Sessions to a term of 10 years' imprisonment for housebreaking. He was then aged 23; his previous record was not good; but he felt considerable resentment at the length of sentence imposed on him, and between April 1, 1955, and July 12, 1957, while a prisoner and serving the 10-year sentence of imprisonment he not only escaped from prison but also committed other acts of misconduct for which, after investigation in accordance with the Prison Rules, 1949 (S.I. 1949, No. 1073), he was awarded losses of remission for good conduct and industry amounting to a total of 848 days.

The plaintiff, who had not appealed against his sentence in time, applied in 1957 for leave to appeal out of time, and the Court of Criminal Appeal, having granted him the longest extension of time for leave to appeal on record, heard his appeal and, on October 14, 1957, quashed the sentence of 10 years and substituted therefor a sentence of seven years' imprisonment, pursuant to its powers under the Criminal Appeal Act, 1907, s. 4 (3).

After that partial success, the plaintiff continued a prisoner in H.M. Prison, Dartmoor, and was of good conduct and industry continuously from October, 1957.

When he had served almost two-thirds of the seven-year sentence he made inquiries of the defendants, the prison commissioners, orally in August, 1958, and through his solicitors in 1959, as to his eligibility for discharge on September 10, 1959 (that being the date on which he would have served two-thirds of his seven-year sentence), in accordance with rule 37 of the Prison Rules, 1949, as amended by rule 3 of the Prison Rules, 1952 (S.I. 1952, No. 1405). The prison commissioners, orally in August, 1958, and by letter dated June 12, 1959, informed him that they held him under a sentence of 10 years' imprisonment, varied on appeal to seven years' imprisonment, and that the awards of loss of remission in respect of the 10-year sentence continued to subsist in respect of the seven-year sentence, notwithstanding that the 10-year sentence had been quashed. He was informed at the same time that the appropriate authority was prepared to consider any application on his behalf for the mitigation or remission of part of the disciplinary awards of loss of 848 days' remission.

The plaintiff elected to seek a remedy through the court, and on September 4, 1959, issued a specially indorsed writ under Ord. 14 claiming declarations (1) that he was eligible for release from prison on September 10, 1959, and (2) that he had not lost or forfeited any remission of the sentence he was now serving.

By his statement of claim he recited the sentence of January 11, 1955, and the quashing of that sentence by the Court of Criminal Appeal on October 14, 1957, and claimed that he had not lost nor forfeited any remission of the substituted sentence and was eligible for release in accordance with rule 37 of the Prison Rules, 1949, as amended by rule 3 of the Prison Rules, 1952, on September 10, 1959, but that by letter dated June 12, 1959, the prison commissioners had expressed their intention not to release him on that date, and had declared that he was not eligible or due for release until January 6, 1962, on the grounds that he had lost remission of the sentence as varied by the Court of Criminal Appeal.

In his accompanying memorandum the plaintiff stated that he would contend that all disabilities, including any awards of loss of remission attaching to the 10-year sentence, were extinguished by the order of the Court of Criminal Appeal quashing that sentence, and that the commissioners had misconceived the effect of that order in purporting to hold him under a sentence of 10 years' imprisonment varied on appeal to seven years, and in contending that the awards of loss of remission in respect of the 10-year sentence continued to subsist in respect of the seven-year sentence. He stated further that he would contend that he had a legal right to have the effect of the order of the Court of Criminal Appeal determined in its application to his present detention; and that, having suffered no award of loss of remission of his seven-year sentence, he had satisfied the conditions laid down by the Prison Rules and was eligible for release.

The prison commissioners' memorandum in reply stated that the substituted sentence of the Court of Criminal Appeal was effective as from the date when the original 10-year sentence was pronounced, namely, January 11, 1955; that on the hearing and determination of his appeal no reference had been made in the Court of Criminal Appeal to any loss of remission already incurred by him or to any conduct on his part which had resulted in or which might occasion a loss of remission; that notwithstanding the use by them of the compendious and convenient phrase "varied on appeal," they had at all material times understood and appreciated that the effect of the order of the Court of Criminal Appeal made on October 14, 1957, was to quash the sentence of 10 years' imprisonment and to substitute therefor a sentence of seven years' imprisonment; that between April 1, 1955, and July 12, 1957, after investigation in accordance with the Prison Rules, 1949, the plaintiff, then being a prisoner serving a sentence of imprisonment, was duly awarded losses of remission amounting to a total of 848 days; and that none of the said awards had been remitted or mitigated under rule 48 of the Rules at the date of the issue of the plaintiff's writ. The prison commissioners added that the plaintiff had been informed that the appropriate authority was prepared to consider any application on his behalf for the mitigation or remission of part of the aforementioned disciplinary awards.

On an application by the plaintiff to Winn J. in the Vacation Court on September 8, 1959, for the trial of this matter during the long vacation and for the date of the trial to be fixed, the judge ordered that the action be tried in vacation on September 18, 1959.

Neil McKinnon Q.C. and *George Shindler* for the plaintiff. The question for the court is the true construction of section 4 (3) of the Criminal Appeal Act, 1907; but the preliminary matter arises as to whether the plaintiff, as a prisoner entitled to the benefit of the Prison Rules, has any cause of action which he can bring before the court.

Sebag Shaw for the prison commissioners. The commissioners take no objection to the plaintiff's obtaining the opinion of the court on the dispute which has arisen on the nature of the sentence he is serving, provided that their discretion to determine when a prisoner is to be released is left completely unfettered.

[WINN J. It is desirable for this man's mental rest that he should have access to the court on the narrow point as to whether he is now serving the same sentence or a sentence deemed to be the same as that in respect of which he suffered losses of remission.]

McKinnon Q.C. continuing. It is submitted that when the Court of Criminal Appeal quashed the 10-year sentence it was made null and void for all purposes with all its incidents, and there was substituted a clean sentence free of all disabilities. The only feature which the new sentence has in common with the former is that it will or may run from the date when the first sentence was passed. That construction of section 4 (3) is supported by the definition of "quash" in the Oxford English Dictionary as, inter alia, "to bring to nothing," "to put down "completely," "to subdue utterly," "to annul."

Secondly, section 25 (1) of the Prison Act, 1952, providing for remission of sentence under the Prison Rules, shows that the only order which can be made in respect of remission is one in relation to "that sentence" which the prisoner is then serving and to no other sentence. In practice a man earns remission automatically, though he has no legal right to it, unless a loss of remission is imposed on him after a quasi-judicial hearing in accordance with the Prison Rules. All the offences in respect of which loss of remission was suffered by this plaintiff were committed while he was serving the 10-year sentence, and they indicate the sense of grievance which he felt about the severity of the sentence which the Court of Criminal Appeal quashed. Moreover, since his new sentence was passed he has behaved himself continuously.

Sebag Shaw for the prison commissioners. The fallacy of the submission for the plaintiff is the proposition that loss of remission is an incident of the sentence. The true position is that the loss of remission is not a disability attaching to the sentence, any more than an award of remission is an advantage attaching to a sentence. Both the grant and the loss of remission are matters of discipline in relation to a prisoner's conduct in prison, and the disabilities attach to the misdoer in person and not to the sentence which he is serving.

The effect of the language of section 4 (3) of the Act of 1907 is that, when the Court of Criminal Appeal alters a sentence, the substituted sentence becomes " the sentence " which the prisoner has been serving since the date of his conviction, and whatever has happened in regard to matters of discipline stands unchanged as a matter of history. The Prison Rules say nothing about the length of sentence which a prisoner is serving; the only references are to maximum penalties which may be inflicted—including forfeiture of remission; but there are many forms of penalty for offences against discipline in prison which could not be undone by changing the sentence, as, for example, restricted diet. It is difficult to see why there should be a different result when the punishment for indiscipline is loss of remission. Loss of remission is punishment for some failure to conform to prison discipline during the time a prisoner is serving a sentence, and it does not matter what sentence it is, whether the original or the new sentence. [*Maguire's* case [4] was referred to.]

If it were right that loss of remission attached to " the " sentence," the position, in view of the terms of section 25 of the Prison Act, 1952, might be different; but that section is in its terms so highly subjunctive as to indicate that the whole matter is one of discretion.

It should be remembered that this plaintiff has refused to avail himself of the remedy under rule 48 of the Prison Rules to have his case considered by the prison authorities, and has chosen to come to the court. In *Smeeton* v. *Attorney-General* [5] the court said that it would not entertain an application for a declaration where there was other machinery for appealing from the decision of Inland Revenue Commissioners, because the court was not concerned to express opinions upon matters which lay in the discretion of specific authorities.

McKinnon Q.C. in reply. The award or loss of remission is not entirely a domestic matter, for section 25 of the Prison Act, 1952, indicates that such awards or losses have a real effect on the legal rights of a prisoner, providing as it does that " on the " discharge of a person from prison in pursuance of any such " remission his sentence shall expire." It follows that if a man, having earned remission, were released and were rearrested as he was leaving the prison, he would have a right to habeas corpus, because, by virtue of the remission which he has earned, his sentence is deemed to have expired.

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[4] (1956) 40 Cr.App.R. 92.

[5] [1920] 1 Ch. 85, 96–98; 35 T.L.R. 706.

Nor is an award or loss of remission something in vacuo which attaches personally to the prisoner. Such a view is contrary to the terms of section 25, which provides that a person serving a sentence of imprisonment may be granted remission of "that "sentence." That indicates that the loss of remission is a disability attaching to the sentence.

As to the plaintiff's election to come to the court for a declaration, the remedy offered by the commissioners was that he should petition for mitigation or remission of part of the loss of remission. That is not a true alternative remedy to the plaintiff's present action, for what he asks is that the court shall declare that the award of loss of remission which he has suffered is, on the true construction of section 4 (3) of the Act of 1907, in respect of the 10-year sentence, and that he has not suffered any loss of remission in respect of the seven-year sentence which he is now serving.

WINN J. I am very much obliged to counsel for their help towards the solution of this preliminary, but in reality the sole substantial, issue which arises in this action.

The plaintiff, Ronald Arthur Hancock, seeks as against the prison commissioners a declaration which he hopes would have the result indirectly of securing his immediate release, whereas, as things are at present, it looks as though he may have to remain in prison until January, 1962, unless the prison commissioners are able to see their way to take a more favourable view of his position than they have done hitherto.

He was sentenced in January, 1955, to a term of 10 years' imprisonment for housebreaking. He was then only 23, but his earlier record was not a good one and, in fact, he had just escaped from prison where he was serving a six-year sentence. I take those last detailed facts from a note which I have seen from the file of the proceedings in the Court of Criminal Appeal. He was sentenced on January 11, 1955, to 10 years' imprisonment. He did not appeal against that sentence until the autumn of 1957, when, rather remarkably (and I am told on very good authority that this case represents the longest extension of time for appeal that has ever been granted), he was granted an extension of time for appealing, and his appeal came on before the Court of Criminal Appeal on October 14, 1957. On that day the Court of Criminal Appeal expressed the opinion that the 10-year sentence was too long, and they made an order, the precise terms of which it is important to note. They were these: "Upon the appeal of the above-named appellant against sentence. "the court doth determine the same and doth quash the sen-"tence passed at the trial, and doth pass a sentence of seven "years' imprisonment and make an order under section 22 of the "Criminal Justice Act, 1948, and doth pass that sentence in "substitution for the sentence of 10 years."

Mr. Neil McKinnon has submitted to me cogently (and one recognises that it is an argument which calls for careful consideration and has considerable weight) that the word "quash" in that order means that the 10-year sentence was thereby rendered null and void, and wholly set aside as though it had never been. There would be persuasive force in that argument, and I would feel very well disposed to accept it, had I not found in the very wording of section 4 (3) of the Act the provision that, wherever the Court of Criminal Appeal does find itself of the opinion that a sentence passed has been too severe, it "shall . . . "quash" that sentence and "pass such other sentence . . . as "they" (the court) "think ought to have been passed in sub-"stitution therefor." When one finds those words in the section and considers the context in which they are used, and the subject-matter to which those words must be applied, one is inevitably driven to the conclusion that the word "quash" is not there used in the sense in which the Shorter Oxford English Dictionary tells me that it often is used, namely, "to annul," "make null "or void," but is used in the less drastic meaning that the former sentence is by the order of the court rendered null and void at the moment when the Court of Criminal Appeal decides to substitute for it a different sentence, so as to make that earlier sentence null and void and of no effect for the future from that point of time onwards, but not so as to render it null and void ab initio, namely, as from the date when it was passed.

I feel that that must be the right way of construing the section, for otherwise, at least as a matter of theory, the successful appellant against the length of sentence would be a person who had been unlawfully imprisoned as from the date of his conviction and removal to gaol until the time when the Court of Criminal Appeal so pronounced; and all measures of restraint exercised on him (not merely by retaining him in gaol but in other ways) in that interim period would be, at least in theory, tortious wrongs committed against him, were it not that the true intent of such an order and the true meanings of the words in subsection (3) of section 4 of the Criminal Appeal Act, 1907, which enables such an order to be made, is that the Court of Criminal Appeal quashes for the future the original sentence, and substitutes for the future the new sentence which the Court of Criminal Appeal considers the proper sentence, albeit that that sentence itself takes its extent from the original date of the first sentence; that is to say, it is a term of so many years calculated from a starting date which is the same date as the starting date of the sentence which has been, in the sense which I have indicated, quashed.

That being so, it appears to me that this man was imprisoned until the time when the Court of Criminal Appeal found in his favour, to the extent of reducing his sentence, by force of, and by virtue of, and under the 10-year sentence, and that on his partial success in the Court of Criminal Appeal he thereafter became a prisoner detained and detainable legally by virtue of and under the strength of and under the new seven-year sentence, being a sentence of imprisonment the duration of which was to be calculated by adding seven years to the starting date of the 10-year sentence, January 11, 1955.

Looked at in that way, the problem posed to me today (which is one well worthy of the consideration of the court, and one which I still think it was right to consider, even in vacation, because the man would naturally labour under a continuing sense of grievance if he could not get his complaint considered for weeks or months after the date—September 10, now already past—when, according to his view of the matter, he would have been released) seems no longer really to be one of great complexity or difficulty. One has to remember, as the *Maguire* case [1] illustrates, that a sentence of imprisonment is a sentence for the period stated by the court in sentencing the convicted person. It is completely fallacious to regard the sentence as one which is to last only for two-thirds of that period. The man or woman so sentenced is sentenced to a period of 10 years, seven years, six years, or whatever it may be; it is only by virtue and by the indulgence of an administrative provision [Prison Rules, 1952 (S.I. 1952, No. 1405)] that in practice prisoners who behave themselves, and for whose encouragement to behave themselves well this provision has been made, may and normally will find themselves discharged from prison by the governor some two-thirds of the way through the period of time named in the sentence. If there is, in fact, a discharge by the governor based on the remission which has been de facto granted to a prisoner, then the sentence expires by the express force of section 25 (1) of the Prison Act, 1952, and thereupon the prisoner is in the position of having completely served a sentence of a period longer than the time during which he has been actually in gaol.

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[1] (1956) 40 Cr.App.R. 92.

One finds in rule 3 of the Prison Rules of 1952, which is an amendment of rule 37 of the Prison Rules, 1949, that arrangements are to be made—and the court knows, though there is no evidence of it, that arrangements have in fact been made—by which a prisoner who is serving a sentence of imprisonment may, by good conduct and industry, become eligible for discharge when a portion of his sentence not exceeding one-third of the whole sentence has yet to run.

This man has reached a date at which it can be said that not more than one-third of the seven-year sentence passed by the Court of Criminal Appeal, calculated from January 11, 1955, has yet to run. That is the mere arithmetical calculation which produces September 10, 1959, the date mentioned to me, as that on which it could be said that there was no longer more than one-third of the seven-year sentence yet to run. That being so, he has become eligible for discharge (that is, has become eligible for the prison commissioners to consider whether they would approve of his being discharged, only if he has been of good conduct and industry). The common ground facts here are that this man, during the time that he has been in prison, has not in fact throughout the whole period been of good conduct and industry. On the other hand, he has for a very considerable time now past, namely, since October, 1957, been of good conduct and industry.

It seems to me, therefore, that the answer to the problem put before me is two-fold, and that it remains with the prison commissioners to decide for themselves what they will do with, for, and by this man, because he is, in my opinion, and I so declare, by good conduct and industry since October, 1957, eligible for consideration by the commissioners as a person who would be discharged because of that good conduct and industry, having now reached a date when not more than one-third of his sentence has yet to run. On the other hand, when and if they consider him, with a view to deciding whether he should be discharged or not—and the court has no power whatsoever to direct them to consider the question at all, for it is within their administrative and uncontrolled discretion whether they will consider him or not—they will inevitably have in mind that he has not throughout the whole period of his detention in gaol been of good conduct or industrious, and therefore did not, prior to October, 1957, acquire by good conduct and industry any eligibility for discharge.

As so often happens when problems are analysed and closely considered, the supposed legal problem is seen not to exist at all and, because it does not exist, it is impossible, in a logical and practical way, for the court or any other adviser to solve it. The practical aspects of the matter are very important. On the one hand, it is manifest that the control of prisons and prisoners by the prison commissioners and the visiting justices should not be interfered with by the courts unless, in any particular case, there has been some departure from law and good administration amounting to an offence in law; I would not think of interfering in any way whatsoever with the entirely unfettered power and discretion of the prison commissioners in this matter. On the other hand, the prison commissioners have consented to my expressing an opinion about this dispute or difference of view between the plaintiff and themselves. It seems to me that they (the prison commissioners) are right in saying that it is quite immaterial whether he was serving the 10-year sentence or serving the seven-year sentence at the time when he attempted to escape, and was guilty of other acts of misconduct which resulted in the imposition on him of sentences of losses of remission. That is quite immaterial in law, and quite immaterial in fact, in all respects except this, that I feel an uneasy doubt whether it may not sometimes happen that some visiting committees—not necessarily this one—when dealing with a man who has been sentenced to 10 years and is still in the first stage, may not be possibly a little more ready to impose a severe loss of remission, having regard to the fact that it is not going to affect the man for several years to come, than they would be to impose that same loss of remission on a man who has reached a stage where it is soon going to be a matter of practical consequence to him that the loss of remission has been imposed. What is more, I venture to say (without, I trust, trespassing into the territory and sphere which is solely that of the prison commissioners) that it seems to me very probable that this man did feel considerable resentment about the sentence that was passed on him in January, 1955—a resentment which those who are best of all qualified to judge the propriety of sentences have found to be substantially justified; and I think the prison commissioners might well have it in mind (if they do see fit, as I hope they will, to consider this man's case now, with a view to deciding whether they can see their way to give him a discharge now or at some date earlier than 1962) that such resentment is likely to stimulate the kind of conduct of which he was guilty in prison; the best evidence of the plausibility of that view is the way in which he has behaved himself once he got a sentence which he, as a man, recognised was not an unjust sentence.

In the light of those observations, and recognising that I have really done nothing more than deliver a discourse which has little to do with the discharge of my proper functions as a judge, I would say that there should be no order of any kind made in this action. If either counsel were to ask me to make an order at all, I would only make it in this form, that I would declare (if so asked) that it is immaterial for the purposes of rule 37 [as amended] that the first sentence was quashed and the second sentence substituted, but that nevertheless, by reason of good conduct since October, 1957, the plaintiff has become eligible for consideration for discharge; but whether he is to be discharged remains entirely in the discretion of the prison commissioners. That seems to me to be a somewhat discursive and not very helpful declaration, and I doubt whether it is worth while making it; but that is all that I would be disposed to do.

No declaration made.
Judgment for the defendants.
No order as to costs.

Solicitors: *S. Sydney Silverman; Treasury Solicitor.*

M. M. H.

REGINA v. BAINBRIDGE.

C. C. A.
1959
June 8.
Lord Parker C.J.,
Byrne and Winn JJ.

Criminal Law—Accessory before the fact—Knowledge of crime—How specific—Oxygen cutting equipment purchased by appellant for thieves—Appellant's knowledge that it was to be used for some criminal purpose—Whether necessary to direct jury as to knowledge of particular crime in view.

[Reported by Miss EIRA CARYL-THOMAS, Barrister-at-Law.]

A bank was broken into by means of oxygen cutting equipment, which was left behind by the thieves. It was later found that it had been purchased by the appellant some six weeks earlier. He was charged with being accessory before the fact to office-breaking, the case against him being that he had bought the equipment on behalf of the thieves with full knowledge that it was to be used for the purposes of breaking and entering premises. He admitted that he had suspected that the equipment was wanted for something illegal, but denied that he had knowledge that it was to be used for any such purpose as it was used. He was convicted, and appealed against the conviction alleging (inter alia) that the judge misdirected the jury as to what they must be satisfied of in order to convict a person of being an accessory before the fact:—

Held, that the judge was correct in directing that it is sufficient to show knowledge of the intention to commit a crime of the type which was committed, and something done, with that knowledge, to help in the commission of the crime; it is not necessary to show knowledge of the particular date and premises concerned. The appeal would be dismissed.

APPEAL against conviction.

The following facts are taken from the judgment. On the night of October 30, 1958, the Stoke Newington branch of the Midland Bank was broken into by cutting the bars of a window, the doors of the strong room and of a safe inside the strong room. They were opened by means of oxygen cutting equipment and nearly £18,000 was stolen. The cutting equipment was left behind and it was later found that that cutting equipment so left behind by the thieves had been purchased by the appellant, Alan Bainbridge, some six weeks earlier. He appealed against his conviction of being accessory before the fact to office-breaking.

Robin Simpson for the appellant. The first ground of appeal is that there was no evidence which showed conclusively that the appellant knew either that this particular breaking and entering was going to be committed or, indeed, that any breaking and entering was going to be committed. If the evidence against him is analysed, it is not more consistent with his knowing that it was to be used for a breaking and entering than with his thinking that it was to be used for some illegal purpose such as the cutting up and disposing of stolen metal. If that is right the verdict of the jury cannot stand: *Rex* v. *Wallace*.[1] There is not one single fact in the evidence adduced by the prosecution which points conclusively to the appellant's guilt.

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[1] (1931) 23 Cr.App.R. 32.

The second ground of appeal is that there was misdirection by the judge as to the degree of knowledge required by the appellant before the jury could convict him as an accessory before the fact. His direction—that if the jury were satisfied without doubt that the appellant bought the equipment and that he knew at some time that a felony of that kind was going to be committed—is far too wide; the proper direction should have been that at the time the appellant bought that equipment he must have had full guilty knowledge in the sense that he knew that a particular crime was going to be committed. The relevant time when considering guilty knowledge of this offence is the time when he does the deed which is alleged to be assisting the felons; at that time he must have crystallised in his mind a definite and particular felony which he believes is intended to be committed. Knowledge can, of course, be no more than belief at that stage. There is no direct authority on this matter. [Reference was made to Russell on Crime, 11th ed., pp. 156 and 161, *Johnson* v. *Youdon*,[2] *Bowker* v. *Premier Drug Co. Ltd.*,[3] *Rex* v. *Lomas*[4] and *Reg.* v. *Bullock*.[5]] The jury should have been directed in plain terms that they must be satisfied that at the time when the appellant bought the equipment he knew that it was to be used for this particular breaking and entering.

Mervyn Griffith-Jones for the Crown. As to the evidence, quite apart from the question of the summing-up, it was not as open to the jury on the evidence to say that the equipment must have been acquired for breaking up stuff which had been stolen already as for breaking into premises.

The summing-up cannot be criticised at all when one has regard to the established principles of law. [Foster's Crown Cases, 3rd ed. (1809), pp. 369 and 372, and *Rex* v. *Betts and Ridley*[6] were referred to.] *Reg.* v. *Bullock*[7] qualified any doubt that there might have been in *Rex* v. *Lomas*.[8] See also Russell on Crime, 11th ed., p. 172. The word "contemplated" is perhaps the most appropriate to use; a man is accessory before the fact if he gives assistance beforehand to the principal for the purpose of the principal carrying out an offence which he then

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[2] [1950] 1 K.B. 544; 66 T.L.R. (Pt. 1) 395; [1950] 1 All E.R. 300.

[3] [1928] 1 K.B. 217, 227.

[4] (1913) 9 Cr.App.R. 220; 110 L.T. 239; 30 T.L.R. 125.

[5] [1955] 1 W.L.R. 1; [1955] 1 All E.R. 15.

[6] (1930) 22 Cr.App.R. 148; 144 L.T. 526; 29 Cox 259.

[7] [1955] 1 W.L.R. 1.

[8] 9 Cr.App.R. 220.

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contemplates. It need not be an offence against a particular contemplated subject.

Robin Simpson replied.

LORD PARKER C.J., delivering the judgment of the court, stated the facts and continued: The case against him [the appellant] was that he had bought this cutting equipment on behalf of one or more of the thieves with the full knowledge that it was going to be used, if not against the Stoke Newington branch of the Midland Bank, at any rate for the purposes of breaking and entering premises.

The appellant's case, as given in his evidence, was this: "True, I had bought this equipment from two different firms. I "had gone there with a man called Shakeshaft to buy it for him. "As a result of conversation which I had with him I was "suspicious that he wanted it for something illegal, I thought it "was for breaking up stolen goods which Shakeshaft had received, "and as the result in those purchases I gave false names and "addresses, but I had no knowledge that the equipment was "going to be used for any such purpose as it was used."

The complaint here is that Judge Aarvold, who tried the case, gave the jury a wrong direction in regard to what it was necessary for them to be satisfied of in order to hold the appellant guilty of being an accessory before the fact. The passages in question are these. He said: "To prove that the prosecution have to prove "these matters: first of all they have to prove the felony itself "was committed. Of that there is no doubt. That is not "contested. Secondly, they have to prove the defendant, this "man Bainbridge, knew that a felony of that kind was intended "and was going to be committed, and with that knowledge he did "something to help the felons commit the crime. The knowledge "that is required to be proved in the mind of this man Bainbridge "is not the knowledge of the precise crime. In other words, it "need not be proved he knew the Midland Bank, Stoke Newington branch, was going to be broken and entered and money "stolen from that particular bank, but he must know the type "of crime that was in fact committed. In this case it is a "breaking and entering of premises and the stealing of property "from those premises. It must be proved he knew that sort of "crime was intended and was going to be committed. It is not "enough to show that he either suspected or knew that some "crime was going to be committed, some crime which might have "been a breaking and entering or might have been disposing of "stolen property or anything of that kind. That is not enough. "It must be proved he knew the type of crime which was in fact "committed was intended."

There are other passages to the same effect, in particular when the jury returned for further directions before they came to their verdict. Later the judge said this: "If, in fact, before it has "happened he, knowing what is going to happen, with full "knowledge that a felony of that kind is going to take place, "deliberately and wilfully helps it on its way, he is an accessory." Then a little further on: "If he was not present he would not be "guilty as a principal, but then you would have to decide "whether he helped in purchasing this equipment for Shakeshaft "knowing full well the type of offence for which it was going to "be used, and with that knowledge, buying it and helping in that "way."

Mr. Simpson, who has argued this case very well, contends that that direction is wrong. As he puts it, in order that a man should be convicted of being accessory before the fact, it must be shown that at the time he bought the equipment in a case such as this he knew that a particular crime was going to be committed, and by a particular crime Mr. Simpson means that the premises in this case which were going to be broken into were known to the appellant and contemplated by him, and not only the premises in question but the date when the breaking was going to occur; in other words, that he must know that on a particular date the Stoke Newington branch of the Midland Bank is intended to be broken into.

The court fully appreciates that it is not enough that it should be shown that a man knows that some illegal venture is intended. To take this case, it would not be enough if he knew—he says he only suspected—that the equipment was going to be used to dispose of stolen property. That would not be enough. Equally, this court is quite satisfied that it is unnecessary that knowledge of the particular crime which was in fact committed should be shown to his knowledge to have been intended, and by "particular crime" I am using the words in the same way in which Mr. Simpson used them, namely, on a particular date and particular premises.

It is not altogether easy to lay down a precise form of words which will cover every case that can be contemplated but, having considered the cases and the law this court is quite clear that the direction of Judge Aarvold in this case cannot be criticised.

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Indeed, it might well have been made with the passage in Foster's Crown Cases (3rd ed. (1809) at p. 369) in mind, because there the author says: "If the principal totally and substantially "varieth, if being solicited to commit a felony of one kind he "wilfully and knowingly committeth a felony of another, he will "stand single in that offence, and the person soliciting will not be "involved in his guilt. For on his part it was no more than a "fruitless ineffectual temptation," the converse, of course, being that if the principal does not totally and substantially vary the advice or the help and does not wilfully and knowingly commit a different form of felony altogether, the man who has advised or helped, aided or abetted, will be guilty as an accessory before the fact.

Judge Aarvold in this case, in the passage to which I have referred, makes it clear that there must be not merely suspicion but knowledge that a crime of the type in question was intended, and that the equipment was bought with that in view. In his reference to the felony of the type intended it was, as he stated, the felony of breaking and entering premises and the stealing of property from those premises. The court can see nothing wrong in that direction.

A second point is taken by Mr. Simpson to this effect, that even if that direction is a valid direction in law, even so there was no evidence on which the jury were entitled to convict. As Mr. Simpson puts it, there was no evidence which was more consistent with the equipment being needed for a felony of this type than for any other kind of illegal venture. It is enough to say that the court has fully considered the evidence and there was ample evidence on which the jury could convict; accordingly, this appeal is dismissed.

Appeal dismissed.

Solicitors: *Dawson & Co.; Director of Public Prosecutions.*

C. A.

1959
March 17.

Jenkins, Morris and Ormerod L.JJ.

HIGH COMMISSIONER FOR INDIA AND OTHERS v. GHOSH.

Conflict of Laws—Sovereign immunity—Counterclaim against sovereign plaintiff—Action by High Commissioner and by foreign sovereign—Claim for money lent—Defence repayment not due—Counterclaim for

[Reported by NORMAN PRIMOST, Esq., Barrister-at-Law.]

slander—Whether counterclaim infringes sovereign immunity—Whether counterclaim related to subject-matter of claim—Diplomatic Immunities (Commonwealth Countries and Republic of Ireland) Act, 1952 (15 *&* 16 *Geo.* 6 *&* 1 *Eliz.* 2, *c.* 18), *s.* 1.

The plaintiffs sued the defendant for money lent or, alternatively, for damages for breach of contract. The defendant contested liability on the claim, and counterclaimed damages for slander against the first two plaintiffs—the High Commissioner for India and the Union of India—in respect of certain statements allegedly made by two doctors at an Indian students' hostel in London. The two doctors were alleged to have been the servants or agents of both the first two plaintiffs or either of them.

The first two plaintiffs applied to strike out the counterclaim on the grounds (inter alia) that the High Commissioner for India was immune from suit and legal process under the Diplomatic Immunities (Commonwealth Countries and Republic of Ireland) Act, 1952,[1] and that the Union of India was a sovereign State:—

Held, that a foreign sovereign by bringing an action in the English courts did not waive his immunity against counterclaims which were unrelated to and independent of the subject-matter of the action; accordingly, the counterclaim for slander would be struck out.

Decision of McNair J. affirmed.

INTERLOCUTORY APPEAL.

By their statement of claim the High Commissioner for India, the Union of India, and the Government of West Bengal sued Dr. Satya Ranjan Ghosh, of 31, Howitt Road, London, N.W.3, for the return of money lent or, alternatively, damages for breach of contract.

The money lent was alleged to consist of three separate loans made by the High Commissioner for India in 1950 to the defendant comprising sums of £75 10s., £120, and £87. The second loan was made on behalf of the Union of India; the third on behalf of the Government of West Bengal. The first loan was

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[1] Diplomatic Immunities (Commonwealth Countries and Republic of Ireland) Act, 1952, s. 1: "(1) Subject "to the provisions of this section— "(*a*) a person for the time being "recognised by Her Majesty's "Government in the United Kingdom as the chief representative in "the United Kingdom of any country "to which this section applies, "whether he is known by the title "of High Commissioner for that "country or by any other title (in "this section referred to as 'a chief "'representative'), shall be entitled "to the like immunity from suit and "legal process, and the like inviolability of residence, official premises "and official archives as are accorded "to the envoy of a foreign sovereign "power accredited to Her Majesty; ". . . (6) The countries to which "this section applies are Canada, "Australia, New Zealand, the Union "of South Africa, India, Pakistan, "Ceylon, Southern Rhodesia, and the "Republic of Ireland."

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alleged to be a repayable advance; the second a loan repayable on demand or, alternatively, repayable in India by instalments within six months of the defendant's arrival in India, it being an implied term of the loan that the defendant return to India within a reasonable time; the third loan was alleged to have been made on condition that the defendant returned to West Bengal within a reasonable time and served the Government of West Bengal for a period of five years.

By his defence the defendant did not admit that any moneys had been lent to him as alleged in the statement of claim, but he contended that, if any loans were made to him, they were repayable only upon his return to India after the completion of his studies in the United Kingdom.

The defendant counterclaimed damages for slander against the first two plaintiffs and two individual Indian doctors alleged to have been in control of or connected with an Indian students' hostel at 89–91, Guildford Street, London, W.C.1, as the servants or agents of the first two plaintiffs. The alleged slander was in respect of certain statements alleged to have been made by the two doctors on different occasions in 1956 and 1957 to students in the hostel, who were patients of the defendant, to the effect that the defendant was an undesirable doctor.

The first two plaintiffs applied by summons to Master Diamond to strike out the counterclaim. The grounds of the application were that the High Commissioner was immune from suit and legal process under the Diplomatic Immunities (Commonwealth Countries and Republic of Ireland) Act, 1952, and that the Union of India was a sovereign State. The second ground of the application was that under R.S.C., Ord. 21, r. 15, the claim raised ought not to be disposed of by way of counterclaim. The master made an order striking out the counterclaim. On appeal to the judge in chambers, McNair J. affirmed the master's order. The defendant appealed.

Dr. Ghosh appeared in person. The ground of appeal is that the judge and master misdirected themselves in holding that the counterclaim had no connection with the action brought by the first two plaintiffs. The position in law is as stated at p. 311 of the Annual Practice (1959). That is, the first two plaintiffs will be entitled to diplomatic immunity in respect of the counterclaim unless it is related to or connected with the claim which they are making. There is, it is submitted, a definite relationship in the present case between the claim for the amount of the loan and the counterclaim for slander. The persons who it is alleged slandered the defendant were two doctors who were agents of the first two plaintiffs. They slandered the defendant because of the alleged non-payment of the loan; the reason for the slander was because of the first two plaintiffs' allegations about the loan. Had there been no suggestion of trouble by the defendant in connection with the loan, there would have been no slander. The subject-matter of the claim is the loan; the subject-matter of the counterclaim for slander is alleged default in repayment of the loan.

The claim and counterclaim are also related because the officials who slandered the defendant were the agents of the first two plaintiffs. Both these matters—the loan and the slander—have arisen through the same individuals. It is difficult to conceive of a more direct relationship between the slander and the loan than that.

[MORRIS L.J. The questions of fact as to the terms of the loan can be decided without investigating the alleged slander.]

The slander is directly connected with the loan because it relates to the subject-matter of the claim—the loan. Because of the defendant's alleged failure to return the moneys lent to him, the hostel will not accommodate students who are his patients. They have been told that the defendant is an undesirable doctor, and told to find some other doctor. They have been told that the defendant failed to repay moneys lent to him. All these matters are interlinked with the loans and the conditions pertaining to the loans.

The concept of diplomatic immunity is different today from what it was one hundred years ago. The courts should not attempt to extend the doctrine; nor is the doctrine absolute; nor should it be capable of capricious application. The courts of this country must, in conformity with the changing views of jurists and courts all over the world, and so as to be in accord with these modern ideas as a matter of comity, limit the doctrine to its proper ambit—that is, it applies only to questions of a diplomatic nature.

T. O. Kellock for the first two plaintiffs. There is no connection between the claim and the counterclaim. The determination of the counterclaim is not necessary for the adjudication of any issues arising out of the claim; it is not necessary for the proper defence to the claim on the loan. The purpose of the rule about waiver of immunity against counterclaims, where a foreign sovereign sues in the English courts, is to enable justice to be done to a party in his defence of the action. To that extent, and that only, a foreign sovereign is taken to have waived his immunity: see the notes to R.S.C., Ord. 16, r. 1, and to Ord. 21, r. 17, at pp. 311 and 508 respectively of the Annual Practice (1959).

Reliance is placed on *South African Republic* v. *La Compagnie Franco-Belge du Chemin de Fer du Nord*,[2] where North J. said[3]: "They have applied now that the other portion of the "counterclaim may be struck out too. They say that a foreign "Government coming here to sue can be met by defence or "counterclaim with respect to the matters incident to the subject-"matter of the action brought by the foreign Government; but "the plaintiffs deny, and the defendants allege that, by the "foreign Government coming here as plaintiffs, they have sub-"mitted to the general jurisdiction of the court, so as to be "capable of being caught and sued here in respect of any matter "which would be a proper subject of litigation between them if "the two parties were private individuals, both resident in this "country, and subject to the jurisdiction of its courts.

"Now, on that, several cases were cited as to the position "of a foreign Government coming here to sue. . . . The first is "*Duke of Brunswick* v. *King of Hanover*,[4] where Lord Langdale "says . . . : 'The cases which we have upon this point go no "'further than this; that where a foreign Sovereign files a bill, "'or prosecutes an action in this country, he may be made a "'defendant to a cross-bill or bill of discovery in the nature of "'a defence to the proceeding, which the foreign Sovereign has "'himself adopted. There is no case to shew that, because he "'may be plaintiff in the courts of this country for one matter, "'he may therefore be made a defendant in the courts of this "'country for another and quite a distinct matter; and the ques-"'tion to be now determined is independent of the fact stated at "'the bar, that the King of Hanover is or was himself plaintiff "'in a suit for an entirely distinct matter in this court.' It is "clear that Lord Langdale considered the law settled. There "may be a proceeding against a foreign government plaintiff by "way of counter-proceeding, by cross-bill, or, what I take to be "not the same as a cross-bill, a bill of discovery—it might be "either a bill of discovery, if necessary, or a cross-bill—in the "nature of a defence to the proceedings set up by the plaintiff;

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[2] [1898] 1 Ch. 190; 14 T.L.R. 65.

[3] [1898] 1 Ch. 190, 194.

[4] (1844) 6 Beav. 1, 38.

"but not a proceeding setting up against the Sovereign another "claim in respect of another and entirely distinct matter."

North J. then considered two later cases and proceeded[5]: "Now, I believe the law is still exactly as it was stated to be at "the time Lord Langdale laid it down in the way in which he "did."

[JENKINS L.J. We need not trouble you further.]

Dr. Ghosh in reply. That case was not one of libel or slander. In an earlier case of the same name there was a counterclaim for libel but the counterclaim was struck out because it could not be conveniently tried together with the claim: *South African Republic* v. *La Compagnie Franco-Belge du Chemin de Fer du Nord.*[6] But the slander in the present case could be conveniently tried with the claim on the loan. *Strousberg* v. *Republic of Costa Rica,*[7] which was one of the cases relied upon by North J. in the second *South African Republic* case,[8] was not concerned with the question of diplomatic immunity. Where a person is being sued in respect of a transaction, it is monstrous and unjust that he should be prevented from setting up a counterclaim in respect of the transaction, even if in an original action there would be no jurisdiction to sue the plaintiff: see *per* Lord Coleridge C.J. in *Griendtoveen* v. *Hamlyn & Co. Ltd.*[9]

There is now no diplomatic immunity for commercial transactions. Lord Denning in *Rahimtoola* v. *Nizam of Hyderabad* said[10]: "If the dispute brings into question, for instance, the "legislative or international transactions of a foreign government, "or the policy of its executive, the court should grant immunity "if asked to do so, because it does offend the dignity of a foreign "sovereign to have the merits of such a dispute canvassed in the "domestic courts of another country: but if the dispute concerns, "for instance, the commercial transactions of a foreign government (whether carried on by its own departments or agencies "or by setting up separate legal entities), and it arises properly "within the territorial jurisdiction of our courts, there is no "ground for granting immunity."

An act of slander is not an act of a diplomatic function. It was not done in the course of any diplomatic duties nor was it part of them.

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[5] [1898] 1 Ch. 190, 197.

[6] [1897] 2 Ch. 487; 13 T.L.R. 567.

[7] (1880) 29 W.R. 125; 44 L.T. 199.

[8] [1898] 1 Ch. 190, 195.

[9] (1892) 8 T.L.R. 231.

[10] [1958] A.C. 379, 422; [1957] 3 W.L.R. 884; [1957] 3 All E.R. 441.

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Jenkins L.J. stated the facts and continued: The law which we have to apply is, I apprehend, well settled. A person entitled to diplomatic immunity, as the High Commissioner for India indisputably is, or a foreign sovereign state, as for this purpose the Union of India admittedly is, cannot be impleaded in the courts of this country in an action such as the plaintiff's counterclaim in respect of slander. It is unnecessary to refer to the law relating to diplomatic immunity and the immunity accorded to foreign sovereign states, because in this particular case it is quite manifest that the subject of the defendant's counterclaim could not have been maintained against the High Commissioner for India and the Union of India as an original action. But the High Commissioner and the Union of India have chosen to come to the courts in this country and to submit to the jurisdiction of those courts for the purpose of establishing their claim in debt against the defendant. By that course of action it is undoubtedly true that they must be taken to have waived their immunity to a certain extent, and the extent of such waiver for the present purpose is this: By bringing their action in this country and submitting to the jurisdiction, the plaintiffs must be taken to have submitted to the jurisdiction not only for the purpose of having their claim adjudicated upon but also for the purpose of enabling the defendant, against whom they are prosecuting their claim, to defend himself adequately, and his adequate defence may include a claim or demand asserted by way of counterclaim. That does not, however, mean that the plaintiffs, having brought their action here, are thereby exposed to any sort of claim which the defendant may choose to raise against them by way of counterclaim, however far removed from the plaintiffs' cause of action the counterclaim may be.

I can conveniently refer to the law as stated in two passages in the Annual Practice (1959). The first passage is to be found at p. 311 in the course of the note to R.S.C., Ord. 16, r. 1, and reads: "A foreign sovereign suing here submits to the jurisdiction so far as to subject himself not only to process of discovery and so forth, but to any set-off or cross-claim which the defendant may set up by way of defence against claim, and which it is necessary for the court to entertain in order to do justice between the parties in regard to plaintiff's claim, but he does not lay himself open generally to counterclaims or cross actions." That is one passage. The other passage is at

p. 508 in the notes to Ord. 21, r. 17, and reads: "A similar "rule applies when a sovereign prince or state over whom our "courts have no jurisdiction (*Mighell* v. *Sultan of Johore* [1]) "submits to bring an action in this country. The defendant is "allowed to plead any set-off or counterclaim against him which "is an answer to his demand; but not to recover any judgment "against him for the excess, or to raise any counterclaim which "is 'outside of and independent of the subject-matter of' the "claim."

Mr. Kellock, for the plaintiffs, referred us to *South African Republic* v. *La Compagnie Franco-Belge du Chemin de Fer du Nord* [2] as providing sufficient authority to support the effect of the passages in the Annual Practice to which I have referred.

Accordingly, I am of opinion that this counterclaim cannot be maintained unless it is shown to be, as regards the relief it claims, sufficiently connected with or allied to the subject-matter of the claim as to make it necessary in the interests of justice that it should be dealt with along with the claim. Dr. Ghosh has said all that could possibly be said in support of his contention, but I am at a loss to see how the subject-matter of the counterclaim, which is a claim for alleged slanders of the defendant by servants of the High Commissioner for India or the Union of India, has any material bearing at all upon the subject-matter of the claim, which in its primary form is simply a claim for money lent.

Accordingly, on the principles to which I have referred, this does not seem to me to be a counterclaim to which the High Commissioner for India and the Union of India must be taken to have submitted by bringing their action in these courts. The counterclaim clearly could not be maintained by independent action, and it is equally clear in my opinion that it cannot be brought into the present litigation on the ground that it is necessary to adjudicate upon the claims for slander in order to do justice on the claim in debt. The view I have formed on the first ground, on which the striking out of the counterclaim was asked for, makes it unnecessary to deal with the second ground, which is the objection under R.S.C., Ord. 21, r. 15.

For the reasons I have endeavoured to state, I am of opinion that the master and the judge were perfectly right in the conclusion to which they came, and I would dismiss this appeal.

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[1] [1894] 1 Q.B. 149; 10 T.L.R. 37, 115.

[2] [1898] 1 Ch. 190; 14 T.L.R. 65.

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MORRIS L.J. I am in entire agreement with the judgment which my Lord has delivered.

ORMEROD L.J. I agree.

Appeal dismissed with costs.
Leave to appeal to the House of Lords refused.

Solicitors: *T. L. Wilson & Co.*

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Oct. 6.

Lord Parker C.J., Ashworth and Hinchcliffe JJ.

In re SHUTER.

Fugitive Offender—Discharge after one month—Jurisdiction of superior court—"May, unless sufficient cause is shown to the contrary"—Whether "may" means must—Fugitive Offenders Act, 1881 (44 & 45 *Vict. c.* 69), *s.* 7.

Words and Phrases—"May"—Fugitive Offenders Act, 1881, *s.* 7.

By section 7 of the Fugitive Offenders Act, 1881: "If a fugitive "who, in pursuance of this Part of this Act, has been com-"mitted to prison in any part of Her Majesty's dominions to "await his return, is not conveyed out of that part within one "month after such committal, a superior court, upon application "by or on behalf of the fugitive, and upon proof that reasonable "notice of the intention to make such application has been given, "if the said part is the United Kingdom to a Secretary of State, "and if the said part is a British possession to the governor of the "possession, may, unless sufficient cause is shown to the contrary, "order the fugitive to be discharged out of custody."

On July 15, 1959, the applicant was committed to Brixton Prison to await his return to Kenya under a warrant issued by the Kenya Government in respect of alleged offences said to have been committed in Kenya. On August 17, over a month after the committal order was made, he had not been conveyed out of the United Kingdom owing to difficulties in finding an escort. On his application for an order that he be discharged pursuant to section 7 of the Fugitive Offenders Act, 1881, on the basis that there was not shown to be any "sufficient cause . . . to the contrary":—

Held, that on the true construction of section 7 the word "may" should be interpreted as mandatory in the absence of sufficient cause being shown to the contrary; that there was, accordingly, no jurisdiction for holding a man beyond one month unless sufficient cause

[Reported by Miss E. CARYL-THOMAS, Barrister-at-Law.]

was shown, but that matters of reasonableness in all the circumstances might be taken into account when deciding whether sufficient cause had been shown; and on the facts disclosed the arrangements made were reasonable and the applicant was not being detained for an unreasonable time.

APPLICATION under section 7 of the Fugitive Offenders Act, 1881.

On July 15, 1959, the applicant, Victor Charles Shuter, was committed to Brixton Prison by the chief magistrate at Bow Street to await his return to Kenya under a warrant issued by the Kenya Government in respect of 11 alleged offences said to have been committed in Kenya at the end of 1958 and the beginning of 1959. The applicant had not been conveyed out of the United Kingdom by August 17, and he applied for an order for his discharge pursuant to section 7 of the Fugitive Offenders Act, 1881.

Neil Butter for the applicant. There is no authority on section 7 of the Fugitive Offenders Act, 1881, and it may be that this is the first application which has been made under the section. The detention of a man in prison beyond the period of time expressly provided for by an Act of Parliament is a very serious matter in this country. "Sufficient cause" in section 7 must relate to (a) something outside the control of the relevant authorities, or (b) some strong and compelling reason such as serious illness on the part of the detainee. It is not sufficient if the cause of the delay consists of mere inconvenience either of the relevant authorities or on the part of the police officers (as it would seem to be in the present case). Under the section the detention of a fugitive for more than one month is not permitted unless sufficient cause is shown to the contrary. The word "may" must be read as "shall."

In this case the Colonial Office do not dispute in their affidavit that Shuter could have been returned to Kenya within one month; neither do they dispute that to their knowledge he ought to have been returned within one month. It is admitted that two police officers were returning to Kenya, one being due to return on August 12 and the other on August 16. The view taken by Mr. Rushford, a senior legal assistant in the Colonial Office, was that it would be preferable to detain Shuter rather than to curtail one of the police officer's leave by one or two days. What need was there to have had two escorts? It goes beyond the bounds of common sense in the circumstances of this case. This is a plea of inconvenience and no more, and the inconvenience was very slight indeed. No inconvenience can be enough to bring a case within the meaning of "sufficient cause." The applicant is entitled to be discharged.

John C. Mathew for the Secretary of State for the Colonies. Under section 5 of the Act, when a magistrate has made his order and the prisoner has been remitted to prison, he may not be removed until the expiration of 15 days. Under section 6 a warrant then issues from the Secretary of State to the escort to give power to the governor of the prison where the detainee is held to hand over the prisoner for the purposes of the escort returning the prisoner to the extraditing colony. A new and fresh warrant is then in existence under the hand of the Secretary of State, and from the time that warrant is issued the detainee is in custody under the provisions of that warrant. Looked at in the context of the three sections (5, 6 and 7), the period enumerated in section 7 is a period defined for the purposes of the time limit in which an application can be made. It is submitted that there is always a discretion in the light of the foregoing sections.

[LORD PARKER C.J. If you are right, and the one month is really the first moment at which an application can be considered, it might be for the court to consider questions of convenience, but if a man must not be kept in prison for more than one month they do not arise. Reasonableness and convenience do not justify keeping a man in prison.]

The whole object of the Act, presumably, is that a person should not be kept in custody for a moment longer than is necessary. The occupation of Shuter was that of a prison officer and he had made complaints about prison officers, and his solicitor had requested the Colonial Secretary to keep him in this country for as long as possible. Because he could not have come before the court in Kenya until the Monday after his arrival there, in any event he would not have been kept in custody for one day longer than was necessary except for a wholly unforeseeable cancellation by the airline company of the aircraft he was booked to travel on.

Michael Worsley for the Governor of Brixton Prison. The argument of Mr. Mathew is adopted, and in addition, on the construction of the word "may" in section 7, it is submitted that, irrespective of whether there is "sufficient cause," that word gives the court a discretion. The onus is upon a person who puts forward the proposition that "may" should be read as "shall" to prove that it should be so. There is no reason here why one should not give to "may" its natural meaning. It would be going against the object of the legislation as a whole to say in this case that the court has no discretion but is compelled to order the release of the fugitive; the delay was only of a matter of hours after the month had expired. Discretion should be exercised so as not to release the applicant here. Testing the section by leaving out the phrase "unless sufficient cause is "shown to the contrary," a complete discretion is given; putting back that phrase removes the discretion only if there is sufficient cause, in which case the court has no power to discharge the fugitive.

Neil Butter in reply. There is no discretion and the attention of the court must be fixed on the sufficiency or insufficiency of the cause.

Michael Worsley in reply. There is ample authority that where "may" appears in one part of a section and "shall" in another, one is compulsory and the other is permissive. Looking at the sections in this Act one finds that very contrast.

LORD PARKER C.J. This is an application made on behalf of one Victor Charles Shuter, now detained in Brixton Prison, for an order that he be discharged pursuant to section 7 of the Fugitive Offenders Act, 1881.

The matter arises in this way. As long ago now as June 17 the applicant appeared before the chief magistrate at Bow Street on a warrant issued by the Kenya Government in respect of some 11 alleged offences said to have been committed by the applicant in Nairobi, at the end of 1958 and the beginning of 1959. The chief magistrate, having heard the evidence, committed him to Brixton Prison to await his removal to Kenya and, from the schedule to the warrant, it is perfectly clear that the offences alleged were very serious offences. On June 30 an application was made to this court for habeas corpus on the ground that the chief magistrate had committed the applicant without any evidence or any sufficient evidence as to the law of Kenya which would bring into operation the Fugitive Offenders Act, 1881, and application in the alternative was made under section 10 of the Act. This court, having heard the application on July 7, refused any relief under section 10, but came to the conclusion that no satisfactory evidence had been called before the magistrate

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as to the law of Kenya, and they thereupon remitted the matter to the magistrate to hear evidence as to that law.[1] He did so on July 15, and on that date, which is the important date in these proceedings, the applicant was committed to Brixton Prison to await his return to Kenya under a fresh warrant. What has given rise to this application is that, although the committal order was dated July 15, when August 17 came, which was over a month from the date of the committal order, he had not been conveyed out of the United Kingdom (he was still in prison), and he applies now to this court saying that, in those circumstances, he ought to be released.

[His Lordship read section 7 of the Fugitive Offenders Act. 1881, and continued:] The application is made on the basis that there is not shown any sufficient cause to the contrary and, accordingly, it is said that this court should order his immediate discharge out of custody. From an affidavit of Mr. Rushford, a senior legal assistant in the Colonial Office, it appears that on July 15, that is, the date of committal, the applicant's solicitor got in touch with Mr. Rushford and suggested that it would be convenient to the prisoner if he was sent back to Kenya at as late a date as possible because of the possibility of recriminations as a result of views he had expressed while in Kenya. However, on the same day the solicitor told Mr. Rushford, in effect, to forget about that, and that the applicant did not want any special arrangements made. Mr. Rushford then apparently sought an escort, and he found that two Kenya police officers, Haddick and Halliday, were due to return from leave on August 12 and August 16 respectively; and on July 21 he booked a passage with British Overseas Airways Corporation for the applicant and for his two escorts to travel on August 16. That air passage was later cancelled, and, in fact, the aircraft on which they would have left went on August 17. By that time, however, this application was being made and, accordingly, that passage was cancelled. Mr. Rushford, in booking for August 16, says this: "In so doing I "was aware that this would mean that the time limit laid down "in section 7 of the Fugitive Offenders Act, 1881, would just be "exceeded. I considered, however, that this was preferable to "curtailing the leave of an officer of the Kenya Police, a force "which I was aware had been working under conditions of great "stress for a long time. I was also influenced in this decision "by the request originally made to me by the [applicant's

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[1] [1959] 3 W.L.R. 603.

"solicitor]"—that the applicant should be sent out as late as possible—"and by the fact that I considered that even if the said "Victor Charles Shuter were to leave the United Kingdom on "August 14 or 15, 1959, he would not come before a magistrate "in Kenya before Monday, August 17, 1959." He goes on to point out that he wrote to the solicitor for the applicant stating the arrangements which had been made for August 16, and that there was no objection.

The first matter which arises is as to the true construction of this section 7. Mr. Butter maintains that it is a section which does not permit the detention of a fugitive for more than one month unless sufficient cause is shown to the contrary. As against that, two arguments are put forward. First, it is said that that is not the effect of the section, and that the reference there to one month is merely referring to the time when an application may first be made, that is, the application can be made any time after a month. Secondly, it is said that "may, "unless sufficient cause is shown to the contrary, order the "fugitive to be discharged out of custody" is not to be read as Mr. Butter would have it read, namely, as "shall unless sufficient "cause is shown order the fugitive to be discharged." It is said that there is a complete discretion. Anything may be taken into consideration save only that if sufficient cause is shown to the contrary, then the discretion is cut down to that extent. I can well see the force of those two arguments; but I have come to the conclusion that by far the most natural interpretation of this section is the interpretation for which Mr. Butter contends.

We have been referred also to sections 5 and 6. I need not refer in detail to those sections but, reading them with section 7, I can see no reason for reading the period of one month in section 7 as referring merely to the time when the application can be made. It seems to me that in ordinary language it is saying that there is no jurisdiction for holding a man beyond one month unless sufficient cause is shown.

As regards the meaning of the word "may," I confess that at one time I was influenced by Mr. Worsley's argument, but if the discretion is completely at large and "may" means "may," then it would be quite unnecessary to have the words "unless "sufficient cause is shown to the contrary." Secondly, it is a case where what is sufficient cause in any particular case may well depend upon opinion and discretion. I think the natural meaning is "shall unless sufficient cause is shown to the contrary "order the fugitive to be discharged out of custody."

So much for interpretation. The question then remains whether the facts disclosed by Mr. Rushford's affidavit and the circumstances of the case do amount to a sufficient cause to the contrary. As regards that, Mr. Butter maintains that "sufficient "cause" there can only relate to something which is quite outside the control of the relevant authorities. It may be that the cancellation of the flight of the aircraft on the last day might be a sufficient cause, or the illness of the fugitive and matters of that sort which are wholly outside the control of the relevant authorities. If that is right, he says, it is perfectly plain here that everything that was done except for the cancellation of the aircraft on the last occasion, were matters within the control of the authorities, and he points out that Mr. Rushford in fact well knew that he was going against the section but found that it was convenient to do so.

I think Mr. Butter's interpretation of "sufficient cause to the "contrary" is too narrow. It seems to me that within those words can be brought matters of reasonableness. If one looks back to section 6, it becomes perfectly clear that the escort or the authorities who were going to receive the fugitive may themselves require the governor of the prison where he is detained to detain him for a reasonable time. I say that because, by section 6, provision is made for a second warrant being issued, namely, a warrant by the Secretary of State in a case such as this, handing the fugitive over to the escort, and it goes on to provide in the last paragraph: "The governor or other chief officer of any prison, "on request of any person having the custody of a fugitive under "any such warrant, and on payment or tender of a reasonable "amount for expenses, shall receive such fugitive and detain him "for such reasonable time as may be requested by the said person "for the purpose of the proper execution of the warrant."

It is true that as far as this court knows, no such warrant has been issued in this case, and that the fugitive is still held under the original committal order. But it is to be observed that if such a warrant had been issued, the Colonial Office acting for the Kenya Government or the police officers, the escort, could themselves, as I understand that section, have produced the warrant to the governor of Brixton Prison and said to him in effect: "Please hold this man for a reasonable time." Accordingly, it seems to me that when one is construing the words in section 7, "unless sufficient cause is shown to the contrary," one is entitled to take into account questions such as reasonableness in all the circumstances. Once one gets as far as that as a matter of construction, it seems to me quite plain that on the facts disclosed in Mr. Rushford's affidavit, no one could say that he was not acting perfectly reasonably in making the arrangements he did. One cannot shut one's eyes to the fact that this is only a matter of a day or two's delay and that the alleged offences are serious offences. There is also the fact that the applicant's own solicitor was informed of the arrangements and took no objection. Of course that latter observation is always subject to the comment that he might well not have had section 7 in mind, but when one is thinking of this matter in terms of reasonableness, it is some evidence that what was being done was perfectly reasonable, and that this man was not being detained for an unreasonable time. In these circumstances, I would refuse the application.

Ashworth J. I agree, and there is nothing I can usefully add.

Hinchcliffe J. I also agree.

Application refused.

Solicitors: *Hopwood, Hilbery, Mote & Leedham-Green; Charles Russell & Co.; The Director of Public Prosecutions.*

DEAN AND ANOTHER v. DISTRICT AUDITOR FOR ASHTON-IN-MAKERFIELD AND OTHERS.

1959
May 5.

Lord Parker C.J., Donovan and Salmon JJ.

Local Government—District auditor—Surcharge—Appeal to Minister from refusal by district auditor to surcharge—Minister's direction to district auditor to surcharge — Surcharge imposed by district auditor in pursuance of Minister's direction—Whether appeal lies to High Court against surcharge so imposed—Whether persons so surcharged may apply for relief to High Court—Local Government Act, 1933 (23 *&* 24 *Geo.* 5, *c.* 51), *ss.* 229, 230.

At the audit of the accounts of an urban district council objection was made by local government electors to certain items of expenditure, upon the grounds that the expenditure had been unlawfully incurred and should be borne personally by those whose acts occasioned the expenditure. The district auditor who conducted the audit decided not to surcharge the amount concerned upon any person. One of the electors appealed from this decision to the

[Reported by Grove Hull, Esq., Barrister-at-Law.]

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Minister of Housing and Local Government under section 229 of the Local Government Act, 1933,[1] and the Minister allowed the appeal and directed the district auditor, in pursuance of section 229 (2) of the Act, to surcharge the amount of the expenditure upon three named persons, who included the two appellants in the present appeal. The district auditor, in compliance with the Minister's direction, surcharged these appellants. They appealed against the surcharge to the High Court under section 229 (1) of the Act, contending that they had a right of appeal because they were persons "aggrieved by a . . . surcharge made by a district "auditor." They also applied by the same motion for relief under section 230 of the Act. It was contended against the appellants that if they had no right of appeal they were debarred from applying to the court for relief, since section 230 provides that a person surcharged may apply "to the tribunal . . . to whom he "might have appealed," and the appellants were not persons who "might have appealed":—

Held, (1) that the rights of appeal given by section 229 (1) were rights of appeal from the acts of the district auditor in the exercise of his judicial as opposed to his administrative duties, that once the audit was made the district auditor was functus officio so far as his judicial duties were concerned, and that therefore no appeal lay in respect of the surcharge made by the district auditor, since it was made in the execution of an administrative duty to obey the direction of the Minister.

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[1] Local Government Act, 1933, s. 229: "(1) Any person who is "aggrieved by a decision of a district "auditor on any matter with respect "to which he made an objection at "the audit, and any person aggrieved "by a disallowance or surcharge "made by a district auditor may, "where the disallowance or surcharge "or other decision relates to an "amount exceeding five hundred "pounds, appeal to the High Court, "and may in any other case appeal "either to the High Court or to the "Minister. (2) The court or Minister "on such an appeal shall have power "to confirm, vary or quash the "decision of the auditor, and to "remit the case to the auditor with "such directions as the court or "Minister thinks fit for giving effect "to the decision on appeal, . . . "(3) Where an appeal is made to the "Minister under this section, he may "at any stage of the proceedings, "and shall, if so directed by the "High Court, state in the form of a "special case for the opinion of the "court any question of law arising "in the course of the appeal, but "save as aforesaid the decision of the "Minister shall be final."

S. 230: "(1) In the case of a surcharge, the person surcharged may, "whether or not he appeals under "the preceding section, apply to the "tribunal (whether the High Court "or the Minister) to whom he "appeals or, if he does not appeal, "to the tribunal (whether the High "Court or the Minister) to whom he "might have appealed, for a declaration that in relation to the subject "matter of the surcharge he acted "reasonably or in the belief that his "action was authorised by law, and "the court or Minister, if satisfied "that there is proper ground for "doing so, may make a declaration "to that effect. (2) Where such a "declaration is made . . . the court "or Minister may, if satisfied that "the person surcharged ought fairly "to be excused, relieve him either "wholly or in part from personal "liability in respect of the surcharge . . ."

(2) That the words in section 230, "the tribunal . . . to whom "he might have appealed," were intended to identify the tribunal to which the application must be made, and did not provide a condition which, if not complied with, debarred the applicant from relief. Accordingly, the fact that the applicants had no right of appeal did not prevent their making an application for relief under section 230.

Per curiam: The words in section 229 (3) of the Act, "the "decision of the Minister shall be final," mean what they say.

Per Salmon J. In the unlikely event of the Minister's representative (on the hearing of an appeal to the Minister) denying a person the right to be heard in his own defence, there may well be a remedy in the High Court; but such a remedy would not be by way of an appeal under section 229 of the Act.

APPEAL against and application for relief from surcharges.

On October 1, 1954, the tenant of a dwelling-house known as No. 1, Shaw Street, Ashton-in-Makerfield, applied to the Ashton-in-Makerfield Urban District Council, under section 26 of the Housing Repairs and Rents Act, 1954, for a certificate that one of the conditions justifying an increase of rent under the Act, namely, that the dwelling-house was in good repair, was not fulfilled. The appellant Frank Burrows, the chief public health inspector of the council, having inspected the premises, prepared a certificate of disrepair in the form prescribed by the Fifth Schedule to the Housing Repairs (Increase of Rent) Regulations, 1954. On October 12, 1954, this certificate was signed by the appellant Frank Dean, the clerk to the council, and was sent to the tenant. The landlord of the premises, one Robert Whitter, was disabled thereby from recovering any sum by way of repairs increase of rent under the Act.

The Housing Repairs and Rents Act, 1954, provides that a certificate of disrepair shall be issued by a local authority if the local authority is satisfied that a dwelling-house is not in good repair. The appellants had no power to issue the certificate of their own motion, and it was therefore invalid.

In 1956 Robert Whitter issued a writ in the Chancery Court of the County Palatine of Lancaster, claiming a declaration that the certificate was invalid. The council resolved to defend the action and engaged a solicitor and counsel. In due course counsel advised that there could be no defence to the proceedings, which were accordingly compromised upon the terms that the certificate was a nullity, and that the council would pay the plaintiff's party and party costs, which amounted to £68 14s. 2d. The council's costs amounted to £50, making a total of £118 14s. 2d.

At the audit of the council's accounts for the year ending March 31, 1957, Robert Whitter and two other local government electors for the urban district attended and made objection to the expenditure of the £118 14s. 2d., contending that this expenditure had been unlawfully incurred and should be borne personally by those whose acts and omissions occasioned the incurrence of the expenditure. The district auditor decided that there had been neither negligence nor misconduct by any member or officer of the council in respect of the incurrence of the expenditure, and refused to make any surcharge.

Robert Whitter, as a person aggrieved by the decision of the district auditor, then appealed to the Minister, who, after a hearing conducted by a person appointed by him, allowed the appeal and directed the district auditor to surcharge the sum of £118 14s. 2d. in equal proportions upon the two appellants and one Richard Lloyd Hughes, who was not a party to the present appeal. In compliance with the Minister's direction, the district auditor surcharged each of the two appellants with one-third of this sum.

The appellants appealed by motion in the Divisional Court from this surcharge, contending that they were persons "aggrieved by a . . . surcharge made by a district auditor" and that therefore an appeal lay to the High Court by reason of the provisions of section 229 (1) of the Local Government Act, 1933. Both appellants also applied by the same motion for relief from personal liability in respect of the surcharge under section 230 of the Act, on the grounds that in relation to the subject-matter of the surcharge they had acted reasonably or in the belief that their action was authorised by law. The respondents to the motion were the district auditor, the council and the Minister of Housing and Local Government.

The judgments and argument are reported solely on the questions whether an appeal to the High Court lay from the act of the district auditor in surcharging the appellants at the direction of the Minister, and whether the appellants might apply to the High Court for relief from personal liability in respect of this surcharge.

C. R. Hurle-Hobbs for the district auditor, taking the preliminary objection that no appeal lay to the High Court from the surcharge and that there was in consequence no right to apply for relief. The auditor made his decision upon this matter at his audit and on closing the audit became functus officio. He cannot reopen the audit, and his powers in relation thereto are spent: *Reg.* v. *Inhabitants of Chiddingstone.*[2] The jurisdiction of this court and that of the Minister are collateral, and this court cannot review the Minister's decision, save under the provision specially made that the Minister may state a case for the opinion of the court upon a question of law.

[LORD PARKER C.J. If the court could entertain an appeal from the Minister, then the Minister could entertain an appeal from the court.]

An appeal under section 229 of the Act must be an appeal from a decision of the auditor. The surcharge made in this case was not made as a result of the auditor's decision, for the auditor acts only as a scribe when he obeys the direction of the Minister. Had the Minister upheld the auditor's decision, no one would suggest that that was not final. The proper remedy for the appellants, if they allege that the Minister's hearing was irregularly conducted, is by certiorari. No appeal lies unless the statute confers one, and in the present case the statute says specifically that the Minister's decision is final.

Section 230 gives to the person surcharged a right to apply for relief to the tribunal to whom he appeals or might have appealed. If the appellants have no right of appeal, then they have no right to come here for relief, since this court is not a tribunal to whom they might have appealed.

J. R. Cumming-Bruce for the Minister of Housing and Local Government. The legislature cannot have envisaged, when giving an alternative right of appeal to the court and to the Minister in cases concerning less than £500, that an aggrieved person should be able to go once to each tribunal. The surcharge is not one made by the auditor within the meaning of section 229 of the Act.

On the matter of relief, whatever the proper construction of the section and however inconvenient the possibility of the Minister and the court reviewing each other's decisions, the Minister is anxious to press for a construction which will ensure that everyone gets the relief that he is entitled to.

Norman F. Stogdon for the appellant Dean. If there is no right of appeal to this court, then there is equally no right to apply for relief, since section 230 only gives a right to apply for relief to the court to whom the applicant appeals or might have appealed. A construction which leads to such a result should be rejected, since this statute is similar to a penal statute and imposes something near to a fine.

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[2] (1862) 2 B. & S. 294; 6 L.T. 44; 26 J.P. 246.

The construction which should be adopted is that the Minister's decision is final only so far as the parties before him are concerned. At the Minister's inquiry Dean and Burrows were really only witnesses and not parties. They were in no position to argue or to call witnesses themselves. It was otherwise with Whitter, the district auditor and the council. There is no machinery in the Act or in regulations for persons liable to be surcharged to be represented. In these circumstances the Minister's representative did not hear matters which he should have done, and there should be an appeal from the Minister's decision.

John Rankin for the appellant Burrows. The words of section 229, " surcharge made by a district auditor," do not mean that the surcharge must be made by the auditor's own decision. They apply to any case where it was the hand of the auditor that made the surcharge. The words of section 230, " In the case of " a surcharge, the person surcharged may, whether or not he " appeals under the preceding section . . ." are a clear indication of the meaning of section 229 and show that a person surcharged should always have a right of appeal. No one can appeal until he is surcharged, and Burrows was not surcharged until the appeal to the Minister. At that appeal he was not a party, but only the servant of one of the parties. He was not represented and was therefore not able to put his case properly. There should be an appeal from such a surcharge.

The council was not represented.

LORD PARKER C.J. These proceedings come before the court by way of an appeal by Frank Dean, who is the clerk to the Ashton-in-Makerfield Urban District Council, and Frank Burrows, the chief public health inspector of that council, against what is alleged to be a decision of the district auditor for the No. 2 Audit District, which includes the urban district of Ashton-in-Makerfield, whereby they were surcharged, together with one Richard Lloyd Hughes, who does not appeal to this court, in the sum of £118 14s. 2d. They also apply for relief under section 230 (1) of the Local Government Act, 1933.

[His Lordship stated the facts and continued:] At the opening of the appeal objection was taken that this court had no jurisdiction in the matter; in other words, that the Minister's decision was final. It was also submitted that not only did this court have no jurisdiction in regard to entertaining an appeal, but that it also had no jurisdiction to entertain an application for relief under section 230.

It is necessary to look at a few sections of the Act in order to see the scheme. Matters of accounts and audit are dealt with in Part X of the Act. Provision is made for the appointment of district auditors, for the audit of accounts by the district auditor, and for the deposit of accounts. By section 226 (1) it is provided: "A local government elector for the area to the "accounts of which the audit relates may be present or may be "represented at the audit and may make any objection to the "accounts before the auditor." By subsection (2): "The "district auditor shall, on the application of any person who "is aggrieved by his decision on any matter with respect to "which that person has made an objection, or of any person "aggrieved by a disallowance or surcharge made by the auditor, "state in writing the reasons for his decision." It was pursuant to that section that Whitter objected at the audit that the district auditor ought to have made a surcharge of this sum of £118. The district auditor, having refused to do so, was required to and did state in writing the reasons for his decision. Then by section 228 (1) it is provided that the district auditor shall have certain duties at every audit held by him. The subsection sets out six items of what he shall do and it is sufficient to refer to only two or three of them. It is his duty by paragraph (*a*) "to "disallow every item of account which is contrary to law"; by paragraph (*b*) "to surcharge the amount of any expenditure dis-"allowed upon the person responsible for incurring or authorising "the expenditure"; and by paragraph (*d*), which is the relevant one in this case, "to surcharge the amount of any loss or "deficiency upon any person by whose negligence or misconduct "the loss or deficiency has been incurred." The district auditor has to come in the course of the audit to certain decisions; he has to decide in the case of an objection whether it is valid or not, and he has to decide under section 228 whether any sum has to be disallowed or surcharged under any one of the paragraphs to subsection (1) of that section.

[His Lordship read section 229 of the Act; and continued:] The preliminary point taken arises on those sections to which I have referred. It is submitted that the surcharge that in fact was physically made by the district auditor, as a result of directions made by the Minister, was not made by the district auditor within the meaning of section 229 (1) and that therefore an appeal will not lie by the party aggrieved to the High Court or the Minister. It is also submitted that in any event, Whitter having appealed to the Minister as a person aggrieved by the district auditor's refusal to comply with his objection and the Minister having determined the appeal, the Minister's decision by virtue of section 229 (3) is final, and that accordingly there is now no appeal to this court. The point, in my view, comes down to the very narrow question of what is meant in subsection (1) by the expression "any person aggrieved by . . . a "surcharge made by a district auditor." Does that include a surcharge made, as in this case, at the direction of the Minister, or is it to be confined to a surcharge made pursuant to the district auditor's duty under section 228? The first thing to observe is that once the district auditor has come to his necessary decisions and the audit is made, he is functus officio so far, at any rate, as his judicial duties are concerned and his only duties thereafter are such as can be found in the statute, which in this case are to obey a direction of the Minister if the matter has been before the Minister or of the court if the matter has been before the court. That is an administrative as opposed to a judicial duty. When one looks at section 229 it appears that all the rights of appeal there set out are rights of appeal from what the district auditor has done in the exercise of his judicial duties. Thus the opening words, "Any person who is aggrieved by a "decision of a district auditor on any matter with respect to "which he made an objection at the audit," are clearly referring to, and can only refer to, the decision that is made under section 226 in the course of the exercise of the auditor's judicial function. Similarly, it seems that "a disallowance or surcharge "made by a district auditor" is again referring to what he has done pursuant to section 228 in the exercise of his judicial duty. Indeed, the very words which follow assimilate the disallowance or surcharge to a decision, for section 229 (1) provides that a person aggrieved "may, where the disallowance or surcharge or "other decision relates to an amount exceeding five hundred "pounds, appeal," thereby clearly showing that appeals in that subsection are appeals from decisions or actions taken in the course of the auditor's judicial duties.

Subsection (2) points to the same conclusion where it provides that "The court or Minister on such an appeal shall have power ". . . to remit the case to the auditor with such directions as "the court or Minister thinks fit for giving effect to the decision

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"on appeal"—that is, the decision of the Minister or of the court. That should be contrasted with the words which follow: "and "if the decision of the auditor is quashed, or is varied," then certain things follow. I think that on that short ground alone, as a pure matter of construction, there is no appeal to this court where the only surcharge made was one by the district auditor acting administratively on the directions of the Minister.

But the matter does not rest there because, as I have already said, subsection (3) provides that subject to the stating of a special case the decision of the Minister shall be final. If those words do not mean what they say, the position would be rather extraordinary. There would be in a sense no end to the possibilities of litigation and the absurdities that would arise. Take the present case. Whitter, instead of appealing, as a person aggrieved, to the Minister, might have appealed to this court and this court might have done what the Minister did. Is it then to be said that these appellants could go to the Minister and in effect ask the Minister to reverse the decision arrived at by this court? It seems to me that the words "the decision of "the Minister shall be final" mean what they say. It is submitted that those words only mean that the decision shall be final as between the appellant Whitter and the district auditor and possibly the local authority. But the decision whether Whitter's objection is right and whether Dean and Burrows are liable to be surcharged is really one and indivisible, and subsection (3) is an added reason for saying there can be no appeal in this case.

It is said with some force by Mr. Stogdon and by Mr. Rankin for the appellants that there is no machinery specifically laid down for the people liable to be surcharged to appear before the Minister or his representative to defend themselves, to be represented by counsel and matters of that sort. It is curious that there is no provision made in the Act itself or by rules to that effect, but the words of section 229 are much too clear to be influenced by considerations of that sort. I have no doubt that at such an inquiry the Minister should, and no doubt does, take every possible step to see that those upon whom the surcharge may fall shall be present, shall hear the accusations made against them and shall in effect be able to defend themselves. So much for the appeal.

As regards the application for relief, that depends on the wording of section 230 (1). [His Lordship read the subsection and continued:] The important words there are that if the person surcharged does not appeal, he may apply to the tribunal, whether the High Court or the Minister, "to whom he might "have appealed." Mr. Stogdon took up the attitude at the outset that if he did not have a right of appeal under section 229, he was also debarred from applying under section 230 because he was not a person who "might have appealed." He invoked that argument in support of his submission that the construction which I have just suggested as the correct construction of section 229 must be wrong, because it would be a most extraordinary position if a man in these circumstances not only had no right of appeal but no right of claiming relief. On behalf of the district auditor it was submitted that not only was there no right of appeal but that there was no right of application under section 230, again because of the words "to whom he might have "appealed." I cannot think that those words were ever intended to provide a condition which, if not complied with, debarred a man from relief; in other words, it was not intended to deal with a case where a man might have no right of appeal at all. What the subsection does is to identify the tribunal to whom the application is made, whether it is the High Court or the Minister. Which it is depends upon the amount of the surcharge: if the amount of the surcharge is over £500, then the application has to be made to the High Court; if it is under £500 it can be made either to the Minister or the High Court.

Accordingly, I think that those words, "to whom he might "have appealed," are not intended to be a condition of an application being made, but are intended merely to identify the particular tribunal to which the application must be made; in other words, the tribunal to which, if there were a right of appeal, the applicant would have appealed.

In my view the present appellants have a right to apply to this court for relief under section 230. The question whether, when a surcharge is being made pursuant to section 228 (1) (*d*), it is possible to say that the applicant has acted reasonably or in the belief that his action was authorised by law is a matter which the court at this stage does not decide. It is enough to say that there is jurisdiction to entertain an application.

DONOVAN J. I agree and for the same reasons.

SALMON J. I agree. I only desire to add this. Dean, Burrows and Hughes were present at an inquiry held by the

Minister's representative and it is not suggested, and could not be suggested, that they were denied the right of putting forward anything they desired to put forward on their own behalf. In the unlikely event of an inquiry of this sort being held and the Minister's representative denying a person, against whom allegations of negligence are being made, the right to be heard in his own defence, I am far from satisfied that such a person would not have any remedy in this court. I am convinced, however, that that remedy would not be by way of appeal under section 229.

[Their Lordships proceeded to hear the applications by the two appellants for relief under section 230 of the Act. Both applications were dismissed.]

Appeals and applications dismissed
with costs to the district auditor.
The Minister of Housing and Local
Government did not ask for costs.

Solicitors: *J. G. Haley; Jaques & Co. for Barker & Midgley, Blackpool; Solicitor, Ministry of Housing and Local Government.*

D. F. MOUNT LTD. *v.* JAY & JAY (PROVISIONS) CO. LTD.

1959
July 1,
2, 17.

Salmon J.

Sale of Goods—Lien of unpaid seller—Transfer to buyer of document of title—Transfer by him to sub-buyer of new document of title—Goods at wharf sold to buyer for resale—Delivery order by seller in favour of buyer—Fresh delivery order by buyer on resale—Effect on unpaid seller's right of lien—Sale of Goods Act, 1893 (56 *&* 57 *Vict. c.* 71), *ss.* 25 (2), 47, *proviso.*

On October 3, 1957, the defendants, owners of a consignment of canned peaches in cartons lying at a wharf, sold part of the consignment to M. for resale to two of M.'s customers, agreeing that the purchase price should be paid by M. out of the moneys received from his customers. The defendants made out delivery orders in favour of M. which were indorsed by M. "please transfer to our sub-"order" and sent them to the wharfingers. On October 4, M. sold the goods to the plaintiffs and at the same time agreed to repurchase them a week later at a price which would give the plaintiffs a small profit. M. made out a fresh delivery order in the same form as those made out by the defendants in his favour, except that it was in favour of the plaintiffs and signed by him, and sent it to

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the plaintiffs, receiving in return their cheque for the purchase price. A week later, the plaintiffs sent that delivery order to the wharf and, in pursuance of their agreement with M., sent him a delivery order in respect of the goods made out in his favour, receiving from M. a cheque for the higher price of the goods. M.'s cheque was dishonoured, whereupon the plaintiffs cancelled the delivery order in his favour. Meanwhile, the defendants, who had not been paid, cancelled their contract with M. and requested the wharfingers to cancel the delivery orders of October 3 made out in his favour. M. was subsequently prosecuted to conviction for obtaining money by fraud from the plaintiffs. An interpleader summons was issued by the wharfingers to decide who was entitled to the goods:—

Held, (1) that the defendants had assented to M. reselling the goods in the sense that they intended to renounce their rights against the goods and to take the risk of M.'s honesty, and, accordingly, had assented to the resale within the meaning of section 47 of the Sale of Goods Act, 1893.[1]

Mordaunt Brothers v. *British Oil and Cake Mills Ltd.* [1910] 2 K.B. 502 applied.

Per curiam. In the absence of assent by the defendants to the resale by M., their rights as unpaid sellers under section 47 would not have been defeated by the proviso, since, on the plain language of the proviso, it applied only where a document of title had been transferred to a buyer, and the same document was then transferred by him to a person taking in good faith and for valuable consideration.

(2) That section 25 (2) of the Act did not apply only where the buyer transferred the actual document of title in his possession with the consent of the seller, for the purpose of the subsection was to protect an innocent person in his dealings with a buyer who appeared to have the right to deal with the goods, and in such

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[1] Sale of Goods Act, 1893, s. 25 (2): "Where a person having bought "or agreed to buy goods obtains, "with the consent of the seller, "possession of the goods or the docu-"ments of title to the goods, the "delivery or transfer by that person, "or by a mercantile agent acting for "him, of the goods or documents of "title, under any sale, pledge, or "other disposition thereof, to any "person receiving the same in good "faith and without notice of any lien "or other right of the original seller "in respect of the goods, shall have "the same effect as if the person "making the delivery or transfer "were a mercantile agent in posses-"sion of the goods or documents of "title with the consent of the owner."

S. 47: "Subject to the provisions "of this Act, the unpaid seller's right "of lien or retention or stoppage in "transitu is not affected by any sale, "or other disposition of the goods "which the buyer may have made, "unless the seller has assented there-"to: Provided that where a docu-"ment of title to goods has been "lawfully transferred to any person "as buyer or owner of the goods, "and that person transfers the docu-"ment to a person who takes the "document in good faith and for "valuable consideration, then, if "such last-mentioned transfer was by "way of sale, the unpaid seller's right "of lien or retention or stoppage in "transitu is defeated. . . ."

cases it provided that any transfer of the goods or documents of title held by the buyer to a person acting in good faith and without notice of any want of authority on the part of the buyer should be as valid as if expressly authorised by the seller; accordingly, the plaintiffs were entitled to the delivery of the goods.

INTERPLEADER SUMMONS.

The following statement of facts is summarised from the judgment. In September, 1957, the defendants, Jay & Jay (Provisions) Co. Ltd., merchants, bought 500 cartons each containing 48 tins of Dorchester brand Australian Standard Yellow Cling sliced peaches for 21s. 10½d. per dozen tins, part of a consignment of 4,500 cartons imported by another firm and lying in the warehouse of Delta Storage Ltd. at Delta Wharf, Greenwich. Towards the end of September the defendants' managing director told one Merrick that the goods were for sale, and on October 3 he agreed to sell to Merrick 150 cartons at 22s. per dozen tins for resale by Merrick to one of his customers. It was agreed that the profit should be divided equally between Merrick and the defendants. Later the same day the defendants' managing director also agreed to sell Merrick a further 100 cartons at 21s. 9d., also for resale, requesting to be paid at once. Merrick made it plain that he would pay the defendants for the goods with the moneys he received from his customers. Two delivery orders were made out by the defendants in favour of Merrick. They were addressed to the wharfingers, dated October 3, 1957, and stated "Please "supply Messrs. L. S. T. Merrick . . . the under-mentioned goods "entered by us in the ship *Newcastle Star*. . . . Charges from "seven days to be paid by goods." The goods were described and the signature of the defendants added. The second delivery order was in precisely the same terms. Merrick added his name and address, which had been inadvertently omitted from the delivery orders, indorsed them "Please transfer to our sub-order" and sent them on to the wharfingers. They were received by the wharfingers well before November 6, 1957. The defendants never received any part of the purchase price from Merrick.

Meanwhile, on October 4, 1957, Merrick had offered to sell the 250 cartons to the plaintiffs at 20s. 6d. per dozen tins, making a total sale price of £1,019 17s. 6d. The plaintiffs agreed to buy and at the same time accepted an offer made by Merrick to repurchase the cartons a week later at a price which would give the plaintiffs a profit of 6d. a dozen tins. On October 4 Merrick gave the plaintiffs a delivery order in respect of the cartons against which the plaintiffs gave him a cheque for £1,019. That delivery order, except that it was signed by Merrick and made out in favour of the plaintiffs, was in the same form as those made out by the defendants on October 3 and sent by Merrick to the wharfingers. Merrick cashed the plaintiffs' cheque. On October 11, 1957, the plaintiffs sent the delivery order which they had received from Merrick to the wharf and on the same day sent Merrick a delivery order for the cartons. The following day Merrick sent the plaintiffs a cheque for £1,045 in pursuance of his agreement to repurchase the cartons, but the cheque was dishonoured and consequently the plaintiffs purported to cancel the delivery order made out by them in favour of Merrick.

On November 6 the defendants, who had been unable to obtain payment from Merrick, wrote to him cancelling their contract with him and wrote to the wharfingers requesting them to cancel the delivery orders of October 3, 1957, made out in Merrick's favour. Subsequently Merrick was prosecuted to conviction for obtaining £1,019 17s. 6d. by fraud from the plaintiffs.

The plaintiffs claimed that they were entitled to delivery of the cartons still in the wharf and the defendants claimed to be entitled to exercise all the rights of an unpaid seller in respect of them. The wharfingers issued an interpleader summons to decide who was entitled to the delivery of the cartons.

S. C. Silkin for the plaintiffs. The parties here are dealing not with specific goods but with unascertained parts of a bulk holding which the warehouseman holds. Each successive vendor gives a purchaser from him a delivery order which gives to that purchaser the right to delivery from the warehouseman of an unascertained portion of the goods. The warehouseman records that right by entry in his books. The goods become specific only when in some way appropriated to the delivery order, usually by actual delivery. At that point, but not before, the property passes. Meanwhile the warehouseman holds a collection of delivery orders and a parallel quantity of unallocated goods. In those circumstances it would not be unreasonable to find a trade custom which governs the rights of the various parties, particularly as traders deal in goods at high speed, often paying cash against delivery order. On payment of cash, and, indeed, even before, they regard their rights as secure. Accordingly, the trade custom contended for is that a purchaser's right to receive goods becomes irrevocable as soon as a delivery order made out in his favour is accepted and recorded by the warehouseman.

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If the custom is established, that is an end of the defence. If not, the defendants rely upon all the rights of an unpaid seller. Assuming that, although never in possession of the goods, they can rely upon these rights, it is contended that they are defeated by both parts of section 47 of the Sale of Goods Act, 1893, in that (i) on the facts they assented to the sub-sale to the plaintiffs, since they deferred their own right to payment until Merrick had himself received payment from a purchaser from him—they contracted to receive half Merrick's profit on the resale; and they left the name of the transferee blank on the delivery orders so that Merrick could insert the name of any sub-purchaser he chose. Thus they showed a clear intention to renounce their own rights as an unpaid seller so as to enable Merrick to resell: see *Mordaunt Brothers* v. *British Oil and Cake Mills Ltd.*[2] (ii) The delivery orders are documents of title: section 62 (1) of the Sale of Goods Act, 1893, and section 1 (4) of the Factors Act, 1889. On a proper construction of sections 47 and 25 (2) of the Sale of Goods Act, 1893, and section 10 of the Factors Act, 1889, the issue of the delivery orders to the plaintiffs was a transfer by way of sale (or pledge) within the meaning of the proviso: see *Ant. Jurgens Margarinefabrieken* v. *Louis Dreyfus & Co.*[3] for the special meaning of "transfer" in the context of the section.

In the further alternative the plaintiffs rely upon attornment by the warehouseman as agent for the defendants consisting of: (i) The entry in the warehouseman's books of the plaintiffs' liability for rent together with the actual fact of their liability as expressed on the delivery orders. A very little will suffice for attornment: *per* Scrutton L.J. in *Laurie and Morewood* v. *Dudin & Sons.*[4] (ii) Delivery by the warehouseman to the plaintiffs' sub-purchaser of 25 cases out of the 250, since this could only be referable to the plaintiffs' right to 250: see *Gillett* v. *Hill.*[5] This was not affected by the prior notice to the warehouseman given by the defendants stopping the goods, since the warehouseman as agent of the defendants had ostensible authority to deal with the goods even after such notice.

S. H. Noakes for the defendants. There is no such custom as that for which the plaintiffs contend. On that assumption a vital question may be how far section 25 (2) of the Sale of Goods

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[2] [1910] 2 K.B. 502.

[3] [1914] 3 K.B. 40.

[4] [1926] 1 K.B. 223, 237; 42 T.L.R. 149.

[5] (1834) 2 Cr. & M. 530.

Act, 1893, applies to the present case. That subsection is in the same terms as sections 9 and 10 of the Factors Act, 1889, and applies where a person obtains (a) possession of the goods or (b) the documents of title thereto. It is clear that Merrick never obtained actual possession of the goods. Did he obtain constructive possession? The wharfingers could not have obtained constructive possession of the goods, because there was no acknowledgment as required by section 29 (3) of the Act of 1893. The mere receipt of the delivery orders by the wharfingers and the recording of that receipt in their books does not operate as an attornment: see *Laurie and Morewood* v. *Dudin & Sons*,[6] in particular *per* Bankes L.J.[7] and Scrutton L.J.[8]

[SALMON J. The essence of the transaction is communication to the other side.]

Yes. *Laurie and Morewood* v. *Dudin & Sons*[9] shows that the mere giving of a delivery note to a sub-buyer does not operate to pass the property. Clearly, on that authority, here there was no passing of the property in the goods, because there was no acknowledgment by the wharfinger.

Section 25 of the Sale of Goods Act, 1893, being merely a reproduction of sections 9 and 10 of the Factors Act, 1889, the same interpretation of "transfer of documents of title" ought to apply as in the Factors Act, 1889. By section 11 of the earlier Act transfer of documents may be effected in one of two ways, either by handing over the document or indorsing it to a person like a cheque. Neither was done here, and, accordingly, there was no transfer of a document of title. To constitute such a transfer it must be the original document which is transferred: see also the proviso to section 47 of the Sale of Goods Act, 1893. If that proposition is accepted, the proviso is inapplicable, because it refers to "the document." Here it is admitted that the actual document was not transferred.

[SALMON J. referred to *Ant. Jurgens Margarinefabrieken* v. *Louis Dreyfus & Co.*[10]]

In that case there was a transfer by indorsement. Pickford J.[11] emphasised the difference between handing over the original document and creating a new one.

As to the meaning of "assent" in section 47 of the Sale of Goods Act, 1893, see *Mordaunt Brothers* v. *British Oil and Cake*

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[6] [1926] 1 K.B. 223.

[7] Ibid. 230.

[8] Ibid. 237.

[9] [1926] 1 K.B. 223.

[10] [1914] 3 K.B. 40.

[11] Ibid. 44.

Mills Ltd.[12] The assent required means an assent given in such circumstances as show that the unpaid seller intends that the sub-contract shall be carried out irrespective of the terms of the original contract. The only difference between the facts of *Mordaunt's* case [12] and the present is that in that case the goods were actually held by the defendants, whereas here they were being held by the wharfingers as agents. *Mordaunt's* case [12] is on all fours with the present as regards any question of assent to the sub-sale bringing the case within the first part of section 47. There is not a shred of evidence that the defendants here assented to the sub-sale. They stipulated for immediate payment by Merrick, which is evidence to the contrary.

Silkin in reply. The material difference between the present case and *Mordaunt's* case [12] is that there the sub-purchaser came along after the original purchase had been entered into and informed the seller of the sub-purchase and the seller merely acknowledged that information. That was rightly held not to amount to an assent to the sub-sale. The situation is quite different here, because the sub-sale was contemplated from the very start and in effect formed a part of the contract between the plaintiffs and Merrick.

[SALMON J. If you are right on this part of section 47, nothing else arises.]

That is so, but it is submitted that the other part of section 47 also protects the plaintiffs. One purpose of the Sale of Goods Act, 1893, is to protect purchasers in successive dealings with goods. It is important to construe its wording in a way beneficial to purchasers. As to section 47, once it is accepted, as it was in *Jurgens'* case,[13] that the word "transfer" in the first part of the proviso means not merely the passing of a document received by the transferor, but includes the actual issue and delivery of a document by the issuer, it becomes quite illogical to give a more restricted meaning to the word "transfer" in the second part of the sentence. The reasoning of Pickford J. in *Jurgens'* case [14] was based on broad common sense and protection for innocent purchasers. It would work the other way to hold that the expression "transfer of the document" in the second part of the sentence in the proviso means only the transfer of the actual document referred to in the first part. What is important is not the document itself but what it represents—i.e., the title to the goods which are being sold. That is exemplified by the words "if such . . . transfer was by way of sale." It is the goods which are transferred by way of sale, not the documents. It follows that when using the words "transfer" and "transfer "by way of sale" the draftsman must have had in mind the transfer of the title whether by passing the goods from hand to hand or by the passing of a document. The effect is precisely the same.

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[12] [1910] 2 K.B. 502.

[13] [1914] 3 K.B. 40.

[14] Ibid. 44.

[SALMON J. Does not "the document" in the second part of the proviso suggest one piece of paper?]

Literally that is so, but read in its context it is submitted that the draftsman had in mind either the document itself or a document analogous thereto which delivers the title. If it were not so, it would mean that the accident of making out a fresh document would create a difference in the rights of the parties, including those who had nothing to do with the making of the document.

As to sections 10 and 11 of the Factors Act, 1889 (which by virtue of section 21 of the Sale of Goods Act, 1893, are unaffected by that Act), section 11 provides that transfer can be by endorsement alone—not necessarily endorsement *and* delivery. Here on the evidence the custom followed in all cases is to endorse the delivery order "please transfer to our sub-order" and then to send it to the wharfinger. That alone does not constitute endorsement, since it does not refer to any particular person, but it indicates to the wharfinger that he will be receiving another delivery order which will be the sub-order referred to. Once that delivery order is made out in the name of a particular person and is received by the wharfinger, it completes the endorsement on the preceding delivery order by identifying the "sub-order" referred to. If the court takes the view that the custom is not sufficiently established, it may be this is why the words "Please "transfer to our sub-order," which otherwise would seem to have no purpose, are inserted—to effect endorsement and hence transfer and so to defeat the unpaid seller's rights, as provided for in these sections.

Cur. adv. vult.

July 17. SALMON J. stated the facts, held that the transaction between Merrick and the plaintiffs was a sale and continued: The case raises the familiar problem—which of two innocent persons, the plaintiffs or the defendants, shall suffer for the trickery of a rogue.

The plaintiffs rely first on section 47 of the Sale of Goods Act, 1893. [His Lordship read section 47, and continued:] There is a proviso to the section, with which I shall deal in a moment. The plaintiffs contend that the defendants assented to the sale or disposition of the 250 cartons by Merrick to the plaintiffs, and thereby lost their right as unpaid sellers to the lien which they would otherwise have had upon the cartons. The defendants contend that if they assented to the sub-sale by Merrick, their assent was not an assent within the meaning of section 47, and rely upon *Mordaunt Brothers* v. *British Oil and Cake Mills Ltd.*[1] It is clear from Pickford J.'s judgment[2] in that case that the assent contemplated by section 47 means "an assent given in such circumstances as show that the unpaid seller intends that the sub-contract shall be carried out irrespective of the terms of the original contract" and must be "such an assent as in the circumstances shows that the seller intends to renounce his rights against the goods." Pickford J. held that there had been no such assent on the part of the sellers.

The facts of that case are, however, very different from those of the present case. There the sellers had at no time any reason to doubt the buyer's ability to pay, and were not informed of the sub-sale until after the sale was effected. Pickford J. held that the sellers had assented to the sub-sale merely in the sense that they acknowledged its existence and the right of the sub-buyer to have the goods subject to their own paramount rights under the contract with the original buyer to hold the goods until paid the purchase price.

In the present case the defendants were anxious to get rid of the goods on a falling market. They knew that Merrick could only pay for them out of the money he obtained from his customers, and that he could only obtain the money from his customers against delivery orders in favour of those customers. In my view, the true inference is that the defendants assented to Merrick reselling the goods, in the sense that they intended to renounce their rights against the goods and to take the risk of Merrick's honesty. The defendants are reputable merchants and I am sure that it was not their intention to get rid of their goods on a falling market through Merrick on the basis that, if he defaulted, they could hold the goods against the customers from whom he obtained the money out of which they were to be paid.

The sale of the 250 cartons was a sale of unascertained goods. In my judgment, however, there is no reason why section 47 should not apply to unascertained goods, although I respectfully agree with Pickford J. that an inference can in some circumstances more readily be drawn against the seller in the case of a sale of specific goods than in the case of a sale of unascertained goods. I hold that the defendants assented to the sale of the cartons by Merrick within the meaning of section 47.

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[1] [1910] 2 K.B. 502.

[2] Ibid. 507.

This is enough to dispose of the case, but I will deal briefly with some of the other points which have been canvassed. Mr. Silkin argues that even had there been no sufficient assent by the defendants, he would be entitled to succeed under the proviso to section 47. [His Lordship read the proviso and continued:] It is conceded that the plaintiffs took that delivery order in good faith and for valuable consideration. Mr. Noakes argues, however, that there has been no transfer by Merrick within the meaning of the proviso. The material words to consider are: " . . . where a document of title to goods has been lawfully transferred to any person as buyer, . . . and that person transfers the document to a person. . . ."

It seems to me that these words confine the proviso to cases where a document is transferred to the buyer and the same document is then transferred by him to the person who takes in good faith and for valuable consideration. If Merrick had indorsed the delivery orders he received from the defendants and transferred them to the plaintiffs, the proviso would, in my judgment, have applied; but he did not do so. He sent those delivery orders to the wharf, and made out a fresh delivery order in favour of the plaintiffs.

It is strange that there appears to be no authority on this point. It is clear that the person who transfers the document of title to the buyer may originate it himself and need not have received it from some third party in order to " transfer " it within the meaning of the proviso: see *Ant. Jurgens Margarinefabrieken* v. *Louis Dreyfus & Co.*[3] In my judgment, however, on the plain language of the section, it must be that very document which is transferred by the buyer for the proviso to operate. I am conscious that this construction leads to a very artificial result, but I cannot avoid it without doing violence to the plain language of the section.

Mr. Silkin, however, also relies on section 25 (2) of the Sale of Goods Act, 1893. [His Lordship read the subsection and continued:] It seems to me that the language of this subsection is less rigorous than that of the proviso to section 47 and does not compel me to hold that the subsection applies only in those cases where the buyer transfers the same document as that of which he is in possession with the consent of the seller. I would observe that there seems to be no authority on this point.

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[3] [1914] 3 K.B. 40.

The object of the subsection is to protect an innocent person in his dealings with a buyer who appears to have the right to deal with the goods in that he has been allowed by the seller to be in possession of the goods or documents of title relating to them. In such a case the subsection provides that any transfer of the goods or documents of title by the buyer to a person acting in good faith and without notice of any want of authority on the part of the buyer shall be as valid as if expressly authorised by the seller.

In the present case the defendants sent the documents of title to Merrick with the intention that they should enable him to obtain money from his customers. With the help of these documents, which he sent to the wharf so that the wharfingers would give a reassuring reply to any inquiry that the plaintiffs might make, or at least not query any delivery order they received from the plaintiffs, Merrick managed to obtain a substantial sum of money from the plaintiffs.

In my view, the transfer by Merrick of the delivery order dated September 4 [instead of October 4] was, by virtue of section 25 (2), as valid as if expressly authorised by the defendants.

The plaintiffs further relied upon custom. The only custom I find proved is the custom for delivery orders to state on their face the number of days (usually seven) from their date after which the person in favour of whom the delivery order is made out shall be liable to the wharfinger for his charges. When the wharfinger receives the delivery order from such person and registers it in his books, he is by custom entitled, without further notice, to charge such person warehousing charges from the date specified in the delivery order. This is a narrower custom than that for which the plaintiffs contended.

Scrutton L.J. pointed out in *Laurie and Morewood* v. *Dudin & Sons* [4] that in the absence of proof of attornment by custom, there must be some sort of communication from the wharfinger to the person holding the delivery order to constitute an attornment.

In the present case the wharfingers made no communication to the plaintiffs, but there exists the custom to which I have referred.

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[4] [1926] 1 K.B. 223, 237; 42 T.L.R. 149.

I am not sure of its relevance here, since these proceedings are not against the wharfingers. It may well be, however, that after seven days from the date of the delivery order, the wharfingers would be precluded from denying the rights, at any rate, of any innocent party from whom they had received it. As I hold, however, the clear view that the plaintiffs are entitled to succeed against the defendants under the Sale of Goods Act, 1893, I need discuss custom no further. There will be judgment for the plaintiffs.

Judgment for the plaintiffs with costs. Declaration that the plaintiffs were entitled to the delivery of the cartons.

Solicitors: *Gershon, Young & Co.; Gouldens.*

E. M. W.

1959
Oct. 8, 9.

Diplock J.

GLADSTONE *v.* BOWER.

Agriculture—Agricultural holding—Tenancy—Protection—Letting of farm and land for period of 18 *months—Whether let for interest less than tenancy from year to year—Agricultural Holdings Act,* 1948 (11 *&* 12 *Geo.* 6, *c.* 63), *s.* 2 (1).

By an agreement in writing the plaintiff let to the defendant a farm and land for a term of 18 months. After the expiry of the term by effluxion of time the defendant failed to give up possession, contending, inter alia, that by virtue of section 2 (1) of the Agricultural Holdings Act, 1948,[1] the agreement took effect as an agreement for the letting of the farm for a tenancy from year to year, under which, no notice to quit having been given, she was entitled to

[Reported by E. Caryl-Thomas, Barrister-at-Law.]

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[1] Agricultural Holdings Act, 1948, s. 2: "(1) Subject to the provisions "of this section, where under an "agreement made on or after the first "day of March, 1948, any land is let "to a person for use as agricultural "land for an interest less than a "tenancy from year to year, or a "person is granted a licence to "occupy land for use as agricultural "land, and the circumstances are "such that if his interest were a "tenancy from year to year he would "in respect of that land be the tenant "of an agricultural holding, then, "unless the letting or grant was "approved by the Minister before "the agreement was entered into, the "agreement shall take effect, with "the necessary modifications, as if it "were an agreement for the letting "of the land for a tenancy from year "to year: . . ."

continue in possession. On the plaintiff's claim for possession and mesne profits:—

Held, that the expression "tenancy from year to year" in section 2 (1) of the Act of 1948 meant a tenancy which created an interest which had the invariable characteristics common to all tenancies from year to year at common law, namely, it must last for one year and unless determined at the end of the first year by notice would be renewed by operation of law for successive periods of one year each until determined at the end of one yearly period by such notice. A lease for 18 months was for an interest greater than a tenancy from year to year, and therefore section 2 (1) did not apply to the tenancy agreement made between the plaintiff and defendant, and the plaintiff was entitled to possession.

ACTION.

By an agreement in writing dated March 29, 1956, made between the plaintiff, Erskine William Gladstone, and the defendant, Alice Mary Bower, the plaintiff let to the defendant the messuage buildings, gardens, land and premises called the Manor Farm in the parishes of Hawarden and Saltney, Flintshire, "for "the term of eighteen months from the 1st day of November "1955 . . . and terminating on the 1st day of May 1957, at the "rent of £550 for the said term." The defendant failed to give up possession of the farm on May 1, 1957.

The plaintiff claimed possession of the farm and mesne profits from May 1, 1957, until possession was given. The defendant contended that she was entitled to possession, inter alia, by virtue of section 2 of the Agricultural Holdings Act, 1948, under which the agreement between the parties took effect as an agreement for the letting of the farm for a tenancy from year to year.

Lionel A. Blundell Q.C. for the landlord. A tenancy which gives the tenant an interest for more than a year is not an interest less than a tenancy from year to year. Reliance is placed on the common law authorities which make it clear that a tenancy from year to year can be terminated at the end of the first or any subsequent year of the tenancy; a tenancy from year to year is in this way distinguished from a tenancy for one year: *Doe* d. *Clarke* v. *Smaridge*[2]; *Doe* d. *Chadborn* v. *Green*[3]; *Doe* d. *Plumer* v. *Mainby*.[4] It is submitted, alternatively, (1) that since a tenancy from year to year is one which can be brought to an end at the end of the first year, even in the case of agricultural holdings (in restricted circumstances), that is its basic nature, and therefore any tenancy which grants a term certain for more than a year is necessarily (on a mere time basis) not something which can be said to be less than a tenancy from year to year; (2) that the two are really different species of tenancy and it is not apt language for a tenancy for a fixed term exceeding a year to be described as a tenancy for a term for less than a year. [Reference was made to *Land Settlement Association Ltd.* v. *Carr*[5]; *Bishop of Bath's Case*[6]; *Reid* v. *Dawson*,[7] and *Scene Estate Ltd.* v. *Amos*.[8]]

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[2] (1845) 7 Q.B. 957.

[3] (1839) 9 Ad. & E. 658.

[4] (1847) 10 Q.B. 473.

This tenancy for 18 months was for a term of years as that expression is used in the Agricultural Holdings Act, 1948. The Act must envisage that "term of years" includes a term of less than two years, because otherwise it would not be necessary to stipulate in section 3 "a term of two years or upwards." It follows that this agreement is a contract of tenancy within the meaning of the Act of 1948, and accordingly the farm is an agricultural holding within that Act; all the provisions of the Act will apply as regards tenant-right, compensation for improvements, and so forth, but not the security of tenure which applies to tenancies terminable by notice to quit. The tenancy is therefore excluded from Part II of the Landlord and Tenant Act, 1954, by paragraph (*a*) of section 43 (1) of that Act, and the landlord is entitled to possession at the end of 18 months.

Anthony Cripps Q.C. and *N. H. Curtis-Raleigh* for the tenant. On the actual wording of section 2 there is at first sight an apparent difficulty in contrasting the interest for which this land is let with the tenancy from year to year referred to in the section. A letting for 18 months and one from year to year are two different species of letting, one for a certain term and the other for an indefinite term: *Oxley* v. *James*.[9] The contrast between an indefinite term and a fixed term is not, however, the one which the section invites the court to make. The comparison must be between like lettings which differ only with respect to the period. In this case a letting for 18 months of agricultural land is to be compared with a letting from year to year of agricultural land. Such a tenancy (from year to year of agricultural land) is a like letting. And it must last in the normal course of events at least two years, because any letting of agricultural land on a tenancy from year to year has a minimum lasting period of two years, with certain exceptions (section 23). An 18 months' letting is less than the two years and therefore comes within the protection of section 2 (1). Alternatively, it is submitted that a letting from year to year, because it is an indefinite letting subject to termination by notice to quit, can properly be said to be greater than a definite letting for one year or for 18 months.

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[5] [1944] K.B. 657; 60 T.L.R. 488; [1944] 2 All E.R. 126.

[6] (1605) 6 Co.Rep. 34b.

[7] [1955] 1 Q.B. 214; [1954] 3 All E.R. 498.

[8] [1957] 2 Q.B. 205; [1957] 2 All E.R. 325.

[9] (1844) 13 M. & W. 209.

It is submitted, secondly, that it is right to look at the general arrangement of the Act and (if the last minor alternative is rejected) to look at the whole picture to see whether the "gap" which there would be if agricultural lettings for a year or less are protected by section 2 (1), those for two years or more are protected by section 3 (1), but those for more than one year but less than two years are not protected at all, is not very much contrary to what is to be expected. Security of tenure was increased by the Agricultural Holdings Act, 1908, by the provision relating to 12 months' notice to quit (section 22), and has remained ever since. By the Act of 1948 it was increased further to the extent that if there was an agreement for two years or more section 3 applied to make it at least as secure as a year to year agreement. Clearly section 2 protects anything up to 364 days, and possibly 365, and the gap is from one year and one day up to two years less one day. That is contrary to what one would expect to find, particularly as a licence to occupy land for use as agricultural land is covered by section 2 even if it is for a period longer than a year. If one of the purposes of the Act is to give greater security of tenure to tenants of agricultural land it is odd that the section should give security of tenure to a licensee under a licence for a period greater than a year but less than two years, but should not give such security to a tenant for the same period.

It is submitted that this period of 18 months is covered by section 2 on the basis of the actual wording and also by reason of the extraordinary gap which there would be if this period were not covered.

As an alternative it is submitted that Part II of the Landlord and Tenant Act, 1954, applies to protect the tenant.

Blundell Q.C. replied.

Cur. adv. vult.

October 9. DIPLOCK J. read the following judgment: This case raises a point—I do not know whether the length of my judgment prevents me from calling it short—as to the true construction of section 2 (1) of the Agricultural Holdings Act, 1948. By an agreement in writing, dated March 29, 1956, the plaintiff let to the defendant a farm and land in Flintshire "for the term "of eighteen months from the 1st day of November, 1955, . . . "and terminating on the 1st day of May, 1957, at the rent of "£550 for the said term." It is common ground and indeed apparent from the other terms of the tenancy agreement, which are those usual in agricultural leases, that the land was used for agriculture and thus "agricultural land" within the meaning of section 1 (2) of the Act. The plaintiff does not contend that it was not an "agricultural holding" within section 1 (1). He concedes that the tenancy is a tenancy for a term of years and that, so far as concerns such rights as freedom of cropping, compensation for improvements and tenant right, etc., as are conferred on tenants of agricultural holdings by the Act, the defendant is entitled to the benefit of the provisions of the Act which relate to these matters. The sole questions are: (1) whether this tenancy agreement falls within section 2 (1) of the Act so as to give to the defendant greater security of tenure than she would have at common law by virtue of her tenancy; and (2) if not, whether Part II of the Landlord and Tenant Act, 1954, applies to the tenancy.

The tenancy agreement on its face created a tenancy for a term certain, that is to say, 18 months, which expired on May 1, 1957. At common law the defendant's interest terminated on that date without any necessity for a notice to quit. The claim in the action is for possession and mesne profits. The principal ground of the defence is that by virtue of section 2 (1) of the Agricultural Holdings Act, 1948, the tenancy took effect as a tenancy from year to year and that, since—as is common ground—no notice to quit has been given, the defendant's tenancy is still continuing and the plaintiff has no right to possession.

The fixed term of 18 months, which is unusual and, indeed, normally quite inappropriate for a farming tenancy, was admittedly chosen with the object of avoiding bestowing on the tenant the security of tenure which the Act confers on most tenants of agricultural holdings, but it is right that I should say—although it cannot affect the matter of construction which I have to determine—that the circumstances were unusual and it is not suggested that there was anything discreditable in the plaintiff's desire to achieve this object, if the law so permits. Whether he has done so is the sole matter which I have to decide.

The Agricultural Holdings Act, 1948, is a consolidation Act and it will be necessary at some stage, and is convenient now, to look briefly at its legislative history. The two principal Acts which it consolidated were the Agricultural Holdings Act, 1923, and Part III of the Agriculture Act, 1947, the latter of which added to and amended the former. As the former consolidated the previous enactments, it is unnecessary to go back further. The Act of 1923 dealt with three classes of agricultural tenancies, that is to say: (1) tenancies for a fixed term, (2) tenancies for lives or for lives and years, and (3) periodic tenancies. This is the result of the definition section, section 57 (1), which, so far as is relevant, is reproduced in section 94 (1) of the Act of 1948. The Act of 1923, however, did not, at any rate as respects termination of their interest, alter the common law rights of tenants and landlords of all agricultural holdings which fell within these classes. Tenancies in the first class, that is, tenancies for a fixed term, were dealt with by providing in section 23, now substantially reproduced in section 3 of the Act of 1948, that a tenancy for a term of two years or upwards should not terminate upon the expiration of the term for which it was granted, unless not less than one or more than two years' notice were given, and that, in the absence of such notice, the tenancy should continue as a tenancy from year to year.

Tenancies in the second class, that is, tenancies for lives or lives and years, now modified by the provisions of section 149 (6) of the Law of Property Act, 1925, were dealt with by section 24 of the Act of 1923 (reproduced substantially in section 4 of the Act of 1948) by granting to the tenant in lieu of emblements a right to continue in occupation until given 12 months' notice to quit, expiring at the end of a year of the tenancy.

The only tenancies in the third class, that is periodic tenancies, dealt with were "tenancies from year to year." It was provided by section 25 (1), now reproduced in section 23 of the Act of 1948, that a notice to quit in the case of such a tenancy should be invalid if it purported "to terminate the tenancy before the "expiration of twelve months from the end of the then current "year of tenancy." Subsection (2) created a number of exceptions to the general provisions. Those in paragraph (*c*), "any "notice given in pursuance of a provision in the contract of "tenancy authorising the resumption of possession of the holding "or some part thereof for some specified purpose other than the "use of the land for agriculture," and paragraph (*d*), "any "notice given by a tenant to a sub-tenant," are the most relevant.

The Act of 1923, therefore, did not purport to affect the common law rights of the parties to all tenancies of agricultural holdings as regards the termination of their interests. It left untouched (a) tenancies for a fixed term of less than two years, and (b) some tenancies from year to year and, in particular, sub-tenancies from year to year, although the tenants of such tenancies fell within the Act of 1923 and benefited from its other provisions. In 1944, however, it was held by the Court of Appeal in *Land Settlement Association Ltd.* v. *Carr*[1] that a periodic tenancy from 364 days to 364 days was not a tenancy from year to year. It did not, therefore, fall within the definition of a "contract of tenancy" in section 57 (1) of the Act of 1923, with the consequence not only that the tenant could not benefit from the provisions as regards notice to quit in section 25 of the Act, but was wholly excluded from the provisions of the Act including the provisions regarding freedom of cropping, compensation for improvements and disturbance, etc.

Such was the state of the law when Part III of the Agriculture Act, 1947, was passed. Section 40 of that Act is reproduced in section 2 of the Act of 1948 and it is convenient that I should turn to it in its present wording. [His Lordship read section 2 (1) and continued:] There follows a proviso excluding certain types of occupation of land from the provisions of the subsection. By subsection (2): "Any dispute arising as to the operation of the "foregoing subsection in relation to any agreement shall be "determined by arbitration under this Act."

Subsection (1) thus assimilates to tenancies from year to year and so brings within the scope of the Act as a whole two kinds of occupation of agricultural land, neither of which was previously within the Act at all, namely: (1) letting for an interest less than a tenancy from year to year, and (2) licences to occupy land for use as agricultural land.

The question which I have to determine is whether this tenancy for a fixed period of 18 months or one and a half years is a letting for an interest less than a tenancy from year to year. It is thus a question of the applicability of subsection (1) to the agreement between the parties as distinct from its operation in relation to that agreement. The Court of Appeal, in

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[1] [1944] K.B. 657; 60 T.L.R. 488; [1944] 2 All E.R. 126.

Goldsack v. *Shore*,[2] has decided that this court has jurisdiction to determine that matter, notwithstanding the arbitration provisions in subsection (2).

At common law a tenancy for a fixed period of one and a half years clearly creates an interest not less than a tenancy from year to year. This is because the tenant's interest under such a tenancy must continue for more than one year, whereas his interest under a tenancy from year to year may determine at the end of one year. The fact that under a tenancy from year to year it may continue for more than one year must be irrelevant to the test laid down in the subsection; otherwise any lease for a fixed term, however long, would create an interest less than a tenancy from year to year, and take effect by virtue of section 2 as a tenancy from year to year, which is inconsistent with the provisions of section 3.

Mr. Cripps, while conceding that this is so at common law, says that it is not so in the case of land occupied for use as agricultural land, to which alone the section relates, for a tenancy from year to year of such land cannot, by virtue of section 23 (1) of the Act, be determined before the expiration of the second year. Any letting of land for use as agricultural land for a fixed period of less than two years is therefore for an interest less than a tenancy from year to year of such land.

There is, I think, a fallacy in this attractive argument. It is in the first place to be observed that section 23 is not in terms dealing with tenancies from year to year. It has been held that it applies to any tenancy where the tenant's leasehold interest is determinable by notice, such as determination under a "break" clause in a lease for a fixed term: see *Edell* v. *Dulieu*.[3] Furthermore, as the provisos show, it does not apply to all tenancies from year to year, see provisos (*c*) and (*d*), or to all notices to quit under tenancies from year to year, see proviso (*b*).

What the section does is to invalidate certain notices which would otherwise determine a tenant's interest in agricultural land, whether under a tenancy from year to year or some other form of tenancy, and one of its consequences is that in the case of most—but not all—tenancies from year to year, the tenant's interest must continue for at least two years.

The expression "an interest less than a tenancy from year "to year" in subsection (1) of section 2 is quite general. The expression "tenancy from year to year" was used by the draftsman to describe an interest which had certain invariable characteristics which would enable one to say that other interests are greater or less than it. A tenancy from year to year at common law is an interest which does possess certain invariable characteristics without which it is not a tenancy from year to year and which constitute a standard by which the magnitude of other interests may be judged; it must last for one year and, unless determined at the end of the first year by notice (either six months' notice or whatever other length of notice, if any, is expressly provided for in the contract of tenancy), will be renewed by operation of law for successive periods of one year each, until determined at the end of one such yearly period by such a notice.

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[2] [1950] 1 K.B. 708; [1950] 1 All E.R. 276.

[3] [1924] A.C. 38; 40 T.L.R. 84.

If Mr. Cripps is right, the "tenancy from year to year" referred to in the subsection has no such invariable characteristics. Whether it can be determined at the end of the first year depends not only upon who are the parties—see paragraphs (*c*) and (*d*) of the proviso to section 23 (1) of the Act—but also on the purpose for which it is determined—see paragraph (*b*). What he is really seeking to do is to read the words "tenancy "from year to year" in section 2 (1) as if they were "a "tenancy from year to year of agricultural land which is not "terminable by a notice to quit to which the proviso to section "23 (1) of this Act applies."

In my view the expression "tenancy from year to year" in section 2 (1) must mean a tenancy which creates an interest which has invariable characteristics, namely, those which I have indicated are common to all tenancies from year to year at common law. Furthermore, I do not think that section 23 can properly be said to transform the interest created by a tenancy from year to year of an agricultural holding into an interest greater than that created by a tenancy from year to year at common law. The subsection modifies the way in which the parties to such a tenancy may exercise some of the rights incidental to that interest. The lease in the present case, being for 18 months, is, in my view, for an interest greater than a tenancy from year to year.

Mr. Cripps naturally relies strongly in support of his construction upon the fact that the construction I have adopted will have some odd consequences. For instance, a licence to occupy land for use as agricultural land, he points out, is caught by the subsection even if it is for a fixed period longer than a year; but it is no less odd, if one of the purposes of the Act is to give greater security of tenure to tenants of agricultural land, that the subsection should cut down the security of tenure of a licensee under a licence for a fixed period greater than two years. For another oddity see *Reid* v. *Dawson*.[4]

Mr. Cripps also relies on what he contends is the plain scheme of the Act as respects security of tenure, namely, that all occupiers of agricultural land, save those included in the proviso to section 2 (1), shall be entitled to remain in possession until their occupation is determined by a notice to quit, subject to the qualifications and restrictions laid down in sections 23 and 24.

If it were permissible to speculate at large as to the intentions of Parliament, I should be tempted to guess that Parliament simply overlooked the case of a lease for a fixed term of between one and two years. If it had considered such tenancies and thought that tenants thereunder should be given greater security of tenure, the obvious way to do so would be to amend section 23 of the Act of 1923, now section 3 of the Act of 1948, by removing the restriction of its application to tenancies for a term of two years and upwards. But I cannot speculate as to Parliament's intention.

The legislative history to which I have referred does not point conclusively to a neat scheme such as Mr. Cripps postulates. The Act of 1923 unambiguously omitted from its provisions relating to security of tenure all leases for a fixed term of less than two years. It also omitted from these provisions and from all other provisions of the Act—although this was not determined by the courts until 1944—all periodic tenancies for periods less than one year. The fact that the Act of 1947 (a) brought the latter class of tenancies within the provisions of the Act, including those relating to security of tenure, and (b) greatly enhanced, by what is now section 24 of the Act of 1948, the security of tenure of those tenants to whose tenancy the security of tenure provisions of the Act do apply, is no conclusive reason for holding, contrary to what I have held to be the natural construction of an Act which cuts down the common law rights of the subject, that it must have intended to bring within its provisions relating to security of tenure leases for a fixed term of more than one, but less than two, years which were already within the other provisions of the Act of 1923.

I hold, therefore, that section 2 (1) of the Act of 1948 does not apply to the tenancy agreement made between the plaintiff and the defendant and that, so far as this Act is concerned, the defendant's tenancy determined by effluxion of time on May 1, 1957.

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[4] [1955] 1 Q.B. 214; [1954] 3 All E.R. 498.

Mr. Cripps' alternative defence under Part II of the Landlord and Tenant Act, 1954, I can deal with shortly. Section 43 (1) (*a*) expressly excludes from the provisions of Part II "a tenancy "of an agricultural holding." By section 69 an "agricultural "holding" has the same meaning as in the Agricultural Holdings Act, 1948. This holding, being a holding of agricultural land comprised in the contract of tenancy for a term of years, is an agricultural holding in the meaning ascribed to it in section 1 of the Agricultural Holdings Act, 1948, and thus excluded from the operation of Part II of the Landlord and Tenant Act, 1954. Section 8 and paragraph 29 of the First Schedule to the Agriculture Act, 1958, upon which Mr. Cripps also relies, amend paragraph (*a*) of section 43 of the Landlord and Tenant Act, 1954, by saying at the end of the paragraph the words "or a tenancy "which would be a tenancy of an agricultural holding if the "proviso to subsection (1) of section 2 of the Agricultural "Holdings Act, 1948, did not have effect or, in a case where the "approval of the Minister of Agriculture, Fisheries and Food was "given as mentioned in subsection (1), if that approval had not "been given."

This amendment, which merely adds an additional exclusion from the operation of Part II of the Landlord and Tenant Act, 1954, of land which is occupied for use as agricultural land, although not an agricultural holding within the meaning of the Agricultural Holdings Act, 1948, is irrelevant to the case of a tenancy agreement between plaintiff and defendant which creates a tenancy of an agricultural holding within the meaning of that Act. The plaintiff is accordingly entitled to judgment for possession and mesne profits as prayed.

Judgment for the plaintiff for possession and mesne profits, with costs.

Solicitors: *Theodore Goddard & Co. for Llewellyn-Jones and Armon Ellis, Rhyl; Ellis & Fairbairn.*

WILTSHIRE *v.* FELL.

C. A.

1959
Nov. 16.

Hodson and Ormerod L.JJ.

[Plaint No. L. 14.]

Debt—Committal order—Power of revocation—Committal for non-payment of debt—Debtors Act, 1869 (32 *&* 33 *Vict. c.* 62), *s.* 5.

Section 5 of the Debtors Act, 1869, contains a power, in certain circumstances, to make an order committing a debtor to prison for non-payment of debt, but there is no power in that section or elsewhere in the Act to revoke the order.

A committal order was made by a county court judge for non-payment of instalments of a judgment debt, later he revoked it, being convinced of the debtor's genuine inability to pay:—

Held, that since there was no power in the statute empowering the judge to revoke the order, once he had made it, he was functus officio and the order could only be revoked on appeal; although that did not take away the judge's power to vary the effect of the order, to suspend its operation or to keep control of the case.

Dictum of Cockburn C.J. in *Evans* v. *Wills* (1876) 1 C.P.D. 229, 234 applied.

Decision of Judge Elder-Jones reversed.

APPEAL from Judge Elder-Jones, sitting at Devizes County Court.

Frederich Wiltshire, a judgment creditor, appealed against an order made on July 13, 1959, by Judge Elder-Jones at Devizes County Court for the revocation of an order previously made by him on January 19, 1959, committing Frank Fell to prison for non-payment of instalments of a judgment debt.

The following statement of facts is taken substantially from the judgment of Hodson L.J.

A judgment was obtained against the debtor on February 14, 1955, for £24 13s. 3d. and costs. On that an instalment order was made under which he was to pay 2s. 6d. a week. He made default in the instalment order, and on May 14, 1956, an order was made committing him to prison for 14 days in respect of £4 13s. accumulation of instalments; that order was suspended on the payment of 7s. 6d. a week. The debtor made certain payments, but on January 19, 1959, there was £19 2s. 6d. outstanding. An order for committal was made, seven days suspended so long as 2s. 6d. a week was paid. Nothing was paid and a warrant was issued on March 25, 1959, but on 10s. being paid to the officer and an offer of 5s. a week being made, it was not executed.

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The matter came before the judge again on July 13, 1959, when he decided that, having regard to the genuine inability of the debtor to pay from time to time because of the misfortune of his wife's mental condition and to the fact that he was not trying to avoid his obligations, he would revoke the committal order. The creditor appealed against that revocation.

G. G. Macdonald for the judgment creditor. The county court judge had no power to revoke the committal order made by him on January 19, 1959, because the Debtors Act, 1869, section 5 of which gives a judge power to make a committal order, contains no power enabling him to revoke it. Accordingly the order for revocation of July 13, 1959, should be set aside.

[Hodson L.J. Is not there an inherent power to revoke the order?]

Having made the order, the judge has no power under section 5 or elsewhere in the Act to revoke it. It was decided in *Evans* v. *Wills*[1] that where a debtor was committed under section 5 of the Act for non-payment of a debt, a second committal order could not be made against him in respect of the same debt. Cockburn C.J. said[2] that the judge having once made a committal order was functus officio. The judge cannot therefore make a second order purporting to revoke the committal order, although he has power to vary or suspend the effect of the order.

Unless the Act of Parliament which gives a judge the power to make a committal order also gives him the power to revoke it, he cannot do so. For instance, section 27 of the Administration of Justice Act, 1956, which empowers a judge to commit to prison a debtor who fails to attend on the hearing of a judgment summons for examination as to means, contains in subsection (4) of section 27 a power enabling the court to revoke the order. But in the absence of any such enabling power in the Debtors Act, 1869, the court has no power to revoke a committal order made under section 5, and the only way in which the order can be got rid of is on appeal.

The debtor was not represented and did not appear.

The case cited in argument is referred to in the judgment.

Hodson L.J. stated the facts and continued: There are several grounds of appeal, but the only ground which it is necessary to discuss is that the judge had no power to make the order for revocation. Imprisonment for debt now depends upon the Debtors Act, 1869, which took the place of the old procedure for imprisonment. The old procedure involved the satisfaction of debt by imprisonment. By the Debtors Act, 1869, there could, under section 5, be no imprisonment which was to operate as a satisfaction or extinguishment of any debt, but the power to commit to prison was still retained, although the Act was intended "for the abolition of imprisonment for debt, for the "punishment of fraudulent debtors, and for other purposes." In section 5 certain exceptions are set out which provide that the court "may commit to prison for a term not exceeding six weeks, "or until payment of the sum due, any person who makes default "in payment of any debt or instalment of any debt due from him "in pursuance of any order or judgment of that or any other "competent court." It is unnecessary to read the whole of that section, which provides that the jurisdiction exercised under it shall be exercised in respect of a judgment in the county court by a judge or his deputy "where it is proved to the satisfaction "of the court that the person making default either has or has "had since the date of the order or judgment the means to pay "the sum in respect of which he has made default, and has "refused or neglected, or refuses or neglects, to pay the same.

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[1] (1876) 1 C.P.D. 229.

[2] Ibid. 234.

"Proof of the means of the person making default may be "given in such manner as the court thinks just; and for the "purposes of such proof the debtor and any witnesses may be "summoned and examined on oath, according to the prescribed "rules." The section continues: "For the purposes of this "section any court may direct any debt due from any person in "pursuance of any order or judgment of that or any other competent court to be paid by instalments, and may from time to "time rescind or vary such order." The meaning of that last paragraph at first sight is not very clear, but it seems that the words "may from time to time rescind or vary such order" must relate back to the word "direct" in the first line of the paragraph, and those words enable the court to vary a direction as to any debt due from any person under any order or judgment. It does not seem to me that "such order" can relate back to the words "any order or judgment," as otherwise it would be doing the surprising thing of enabling the judge to vary a judgment which had previously been delivered. There are no other words in that section or elsewhere in the Act which enable a judge to revoke an order for committal to prison which he has made.

In contrast, there is section 27 of the Administration of Justice Act, 1956, which provides for penalties in the case of debtors failing to attend on the hearing of a judgment summons for examination as to their means. That section provides that a judge may in such a case make an order committing a debtor to prison for a period not exceeding 14 days in respect of the failure to attend or the refusal to give evidence, having attended. Section 27 (4) provides: "The judge may at any time revoke an "order committing a person to prison under this section and, "if he is already in custody, order his discharge." There is, therefore, the omission from the Act of 1869 of any power such as that contained in the Act of 1956 to revoke an order made for committal to prison. There is, furthermore, some assistance to be derived from *Evans* v. *Wills*[1]; where a debtor had been committed upon a judgment summons under the Debtors Act, 1869, for non-payment of a debt, it was held in that case that a second warrant of commitment could not be issued against him in respect of the same debt. It was pointed out that where the order or judgment made the debt payable by instalments the debtor might be committed for the full period of six weeks for default in payment of the instalments.

Archibald J., following Cockburn C.J., delivered the second judgment and referred to the old law and the introduction of the Debtors Act, 1869, which now regulates the position of debtors; and having read section 5 he continued[2]: "The question is "whether an order of commitment may be made more than once "for the same debt. The proviso in section 5 seems to me only "to have altered the law to the extent that is expressed: it "gives no authority to commit 'from time to time.' I do not "therefore think the judge had any power in this case to make "the second order of commitment. He must exercise the autho-"rity given to him once for all. The second proviso in section 5 "imposes (amongst others) this restriction upon the judge's "power, viz., that 'such jurisdiction shall only be exercised "'where it is proved to the satisfaction of the court that the "'person making default either has or has had since the date of "'the order or judgment the means to pay the sum in respect "'of which he has made default, and has refused or neglected, "'or refuses or neglects, to pay the same.' And it contains this "further enactment, that, 'for the purposes of this section, any "'court may direct any debt due from any person in pursuance

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[1] (1876) 1 C.P.D. 229.

[2] Ibid. 235.

" 'of any order or judgment of that or any other competent court " 'to be paid by instalments, and may from time to time rescind " 'or vary such order.' Thus, there may be a fresh imprisonment " for default in payment of each instalment."

Then there is set out a proviso that no imprisonment is to operate as a satisfaction of the debt; but for that proviso imprisonment would operate in satisfaction of the debt, even as against the goods of the debtor.

Cockburn C.J. in his judgment said[3]: " [a judge] may make " an order for the commitment of the debtor for six weeks, or " any less period; but, having once done that, he is functus " officio. We cannot give the judge a power which the legislature " has not conferred upon him. And this is in analogy to the old " law. When a man was once arrested on a ca. sa., he could " not if let out be imprisoned a second time for the same debt. " It is true that where, under this Act, an order is made for " payment of the debt by instalments, each instalment becomes " a separate debt for default in payment of which a separate order " of commitment may be made. This, no doubt, is somewhat " anomalous; for the debtor may thus be imprisoned under " repeated commitments for a whole year. But there is the " enactment, and we must give effect to it. It does not, however, " by any means follow that, where the debt is not ordered to be " paid by instalments, there can be more than one commitment " for the same default. I do not think the Act has given any " such power."

In my judgment, the position is that the Act having given no power to revoke a committal order, the committal order which has been made must stand and can only be revoked upon appeal. That does not, in any way, take away from the judge the power to vary the effect of the order or to suspend its operation or in any way to remove his control of the case.

The difficulty the creditor is in, if the order is revoked, is that he cannot, in the future, obtain any further sanction in respect of the amount which was involved in the order of January 19, 1959. For these reasons, the appeal must be allowed, and the order of the judge must be varied in so far as he has purported to revoke the order for commitment. He did, in fact, having revoked the order for commitment, make a different instalment order, which, at the rate of 5s. a week, would, I suppose, operate as a term of the suspension of the committal until the matter is further reviewed by him. All that this court is doing, and all that it is asked to do, is to reverse the judge's revocation of the committal order itself.

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[3] 1 C.P.D. 229, 234.

ORMEROD L.J. I agree. The power which is given to a county court judge to commit a debtor to prison if he is in default in payment of a judgment debt is a statutory power and depends upon section 5 of the Debtors Act, 1869. That section sets out precisely the circumstances in which a judge has power to commit, and the maximum period for which he is empowered to commit a debtor to prison; but the section makes no provision for the judge to revoke the order if, in the circumstances, he should think that a proper thing to do. As there is no power of revocation in section 5 or in any other section, so far as I am aware, it would appear that the only means of having an order set aside is by appeal. Whether, in fact, the revoking of an order in this way would mean that a judgment creditor would be unable in future to obtain another judgment summons, and thereby be deprived of his sanction, as has been suggested in the argument, is a matter about which I am not entirely satisfied. It might be that the revocation of an order would have the effect that no order had in effect been made, and, therefore, another committal order could be made in respect of that money. But that is not a matter involved in this appeal and I make no further comment on it.

So far as the power of the judge to revoke an order which he has made under this section is concerned, I agree that he has no such power. The matter is summed up as neatly as it can be by the words of Cockburn C.J. in *Evans* v. *Wills*,[4] where he said[5]: "he may make an order for the commitment of the debtor for "six weeks, or any less period; but, having once done that, he "is functus officio." I agree that this appeal should be allowed.

Appeal allowed; order revoking the committal order reversed with costs.

Solicitors: *Vallance & Vallance for Parry, Mackan & Hamilton, Bristol.*

I. G. R. M.

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[4] 1 C.P.D. 229.

[5] Ibid. 234.

CUBAN ATLANTIC SUGAR SALES CORPORATION v. COMPANIA DE VAPORES SAN ELEFTERIO LIMITADA.

C. A.

1959
Nov. 23, 24.

Hodson and Ormerod L.JJ.

[1959 C. 393.]

Practice and Procedure—Writ—Service out of jurisdiction—Contract—Cargo to be shipped to safe port in United Kingdom at holders' option—Option to be declared before arrival of ship off Land's End—Sinking of ship before opportunity to declare option—Whether breach of contract for non-delivery within jurisdiction—R.S.C., Ord. 11, *r.* 1 (*e*).

Ships' Names—St. Elefterio.

The plaintiffs were holders of bills of lading under which the defendant shipowners, a Costa Rican corporation, undertook to load sugar in Cuba and to deliver to one safe port in the United Kingdom at plaintiffs' option, to be declared 120 hours before the ship arrived off Land's End. The ship sank shortly after sailing, before the option could be declared. The contract was governed by American law and was subject to the Hague Rules. The plaintiffs sought and obtained leave, pursuant to R.S.C., Ord. 11, r. 1 (*e*),[1] to serve notice of the writ, claiming damages for non-delivery, in Costa Rica, on the ground that there had been a breach of contract at every port within the United Kingdom, so that a breach had been committed within the jurisdiction. On appeal:—

Held, allowing the appeal, that as the contract could be performed in Scotland or Northern Ireland, as well as in England, until a port in England had been nominated it could not be said that it was to be performed within the jurisdiction; such breaches as might be proved, such as unseaworthiness or failure to arrive off Land's End, must have taken place out of the jurisdiction.

Bell & Co. v. *Antwerp, London and Brazil Line* [1891] 1 Q.B. 103 and *Comber* v. *Leyland and Bullins* [1898] A.C. 524 applied.

Decision of Winn J. reversed.

APPEAL from Winn J.

The defendant shipowners appealed from an order of Winn J. made on October 22, 1959, which gave the plaintiffs leave to serve notice of writ outside the jurisdiction. The plaintiffs claimed, as holders of two bills of lading dated January 25 and 31, 1958, damages for breach of contract in respect of the non-delivery at

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[1] R.S.C., Ord. 11, r. 1: ". . . "service out of the jurisdiction of a "writ of summons or notice of a writ "of summons may be allowed by the "court or a judge whenever . . . (*e*) "The action . . . is one brought "against a defendant not domiciled "or ordinarily resident in Scotland "or Ireland in respect of a breach "committed within the jurisdiction of "a contract wherever made . . ."

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CUBAN ATLANTIC SUGAR SALES CORPN. *v.* SAN ELEFTERIO (C/V) LTDA.

United Kingdom port of a number of bags of Cuban centrifugal sugar shipped on board the defendants' steamship *St. Elefterio* at Matanzas and Tarafa, Cuba. The matter came before Master Diamond in chambers, who gave the plaintiffs leave on an ex parte application to issue a concurrent writ of summons against the defendants and to serve notice of writ at Costa Rica where the defendants were incorporated. On the matter coming later before Master Harwood, who heard counsel on both sides and read affidavits, it was ordered that the order of Master Diamond should be discharged.

The contract between the parties was contained in bills of lading, which incorporated a charterparty headed "New York," dated November 4, 1957, which related to this ship; and by the addenda to the charterparty it was provided that the ship should proceed as ordered by charterers or their agents and with all convenient speed to (by the second addendum) one safe port United Kingdom at charterers' option, excluding Manchester and Dunston. The discharge port was declarable 120 hours prior to the vessel's arrival off Land's End. This charterparty was to be governed by American law. The arbitration clause provided that any dispute should be settled by commercial men resident in New York. The general average was to be settled in New York. The charterparty contained a clause paramount, incorporating the United States Carriage of Goods by Sea Act, and thereby incorporated the Hague Rules. The steamer was described in the charter as being tight, staunch, strong and in every way fitted for the voyage.

After the bags of sugar had been loaded at Cuba, the ship sank with the cargo on February 6, 1958, and the cargo was lost. Accordingly, no port was nominated.

On appeal, Winn J. set aside the order of Master Harwood and granted the plaintiffs' application. The shipowners appealed.

Michael Kerr for the shipowners. The jurisdiction under Order 11, rule 1, must be exercised with the greatest care, as it impinges on the sovereignty of other nations. The contract alleged to have been broken has no connection with this country, except that in a certain event, which never arose, the shipowners might have been called on to perform an obligation within the jurisdiction. The cargo owners are at liberty to sue elsewhere, in Costa Rica or New York, and this contract is connected more with New York than anywhere else.

This is not an action brought in respect of a breach committed within the jurisdiction; even if it were, no breach has been committed within the jurisdiction. The plaintiffs claim damages for breach of contract for failure to deliver cargo at a United Kingdom port; that puts them out of court in limine because there are United Kingdom ports outside the jurisdiction, and no direction to deliver at an English or Welsh port was ever given. Any breaches which the shipowners may have committed would be (a) a failure to exercise due diligence to make the vessel seaworthy—if there was such a breach it took place in Cuba; (b) a failure to bring the ship into a position off Land's End so that orders for discharge could be given, and that failure took place at sea outside the jurisdiction. The right to have the cargo discharged never vested in the cargo owners, because no port was ever nominated.

The judge was wrong in holding that the contract was broken at every permissible port of discharge in the United Kingdom; that is fallacious, because the obligation was not to deliver at every United Kingdom port, but at one port as ordered. The judge was also wrong in treating the defendants' breach in effect as an anticipatory breach on the basis that the locus of the breach was not only where it was committed but also the place where the contract might have been performed if it had not been broken. This is a case of actual breach and not of anticipatory breach; further, even if this could be treated as an anticipatory breach, the authorities show that for the purposes of Order 11 the breach is where the anticipatory breach took place and not at the place where the contract would later have been performed had there been no breach: see *Holland* v. *Bennett*[2] and *Cherry* v. *Thompson*,[3] both approved in *Martin* v. *Stout*.[4] In effect the judge has held that the court has jurisdiction under Order 11 in cases where the contract can be performed either inside or outside the jurisdiction.

There are certain authorities dealing with the rule as it was worded before 1921 which allowed service out of the jurisdiction when the contract was one which "ought to be performed within "the jurisdiction." In *Bell & Co.* v. *Antwerp, London and Brazil Line*[5] it was said that a contract which might be performed either in or out of the jurisdiction did not satisfy the rule. This was followed in *The Eider*,[6] and both cases were approved by

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[2] [1902] 1 K.B. 867; 18 T.L.R. 510.

[3] (1872) L.R. 7 Q.B. 573.

[4] [1925] A.C. 359; 41 T.L.R. 176.

[5] [1891] 1 Q.B. 103.

[6] [1893] P. 119.

Lord Shand in *Comber* v. *Leyland and Bullins.*[7] It is submitted that the same principle applies to the present language of the rule. If the decision under appeal is right, where a contract has been broken by a defendant abroad, if the plaintiff could but for the breach have required the defendant to perform part of the contract in England, even where England is only a possible place of performance, it follows that the defendant has committed a breach in England; such a conclusion must be contrary to the language of the rule and the authorities.

J. F. Donaldson for the cargo owners. The obligation alleged to be broken was one to deliver the cargo at a port of discharge in good order and condition. The obligation under the Hague Rules to use due diligence to make the ship seaworthy is not a condition precedent to performance, nor is the obligation to arrive within 120 hours of Land's End; if these requirements are not met it may be that the plaintiffs have other causes of action; the obligation is to deliver the cargo and it matters not whether a port is nominated or not. If a contract is repudiated, the innocent party has an option whether to accept the repudiation or to insist on performance. In *Holland* v. *Bennett*[8] the plaintiffs chose to rely on an anticipatory breach, and so no final breach could arise. The nomination of a port by the plaintiffs was not a pre-requisite of their right to sue for non-delivery; if they failed to nominate, there would be a duty on the defendants to deliver somewhere in the United Kingdom. It can make no difference where the ship sank, and it cannot be the law that the plaintiffs should make a futile nomination after the ship has gone to the bottom owing to a breach by the defendants.

As to the locus of the breach, the judge has held that it was both within and without the jurisdiction. The defendants' primary obligation is to be in a position to deliver at a United Kingdom port, and that liability can be reduced only by the nomination of a port by the plaintiffs. The defendants' breach has put it out of the plaintiffs' power to make an effective nomination, so that the defendants are left with their obligation to deliver at any port in the United Kingdom and the plaintiffs can complain of their having failed to deliver at any port in England. The defendants cannot be heard to deny that they have committed a breach in England because they have made it impossible to nominate an English port. An analogous case is *Ex parte Hayward,*[9] where it was held that the holder of a bill of exchange, who was entitled to payment anywhere, could elect to sue in this country.

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[7] [1898] A.C. 524, 533.

[8] [1902] 1 K.B. 867.

[9] (1886) 3 T.L.R. 687.

Alternatively, there is evidence that the plaintiffs intended to nominate a certain English port, and on the facts they must be deemed to have nominated it, as the defendants had put it out of their power to make an actual nomination. [*Mackay* v. *Dick* [10] was referred to.] The wording of the rule has been altered since the decisions on which the defendants rely, and the two sets of language contemplate different points of time in examining the position. The new wording entitles the court to inquire how the contract should have been performed, and, if the defendants are right, they can repudiate jurisdiction throughout the whole range of delivery. The rule contemplates that a breach will have some geographical situation, and the court is entitled to inquire where, on the balance of probabilities, the breach took place. There is an affidavit available which indicates that the plaintiffs, if they had had the opportunity, would have nominated Hull as the port of discharge.

[The court did not permit the affidavit to be read.]

Kerr in reply. The contract came to an end when the cargo went to the bottom, and the plaintiffs, by issuing the writ, accepted the repudiation and confirmed the breach committed abroad. The plaintiffs' case amounts to saying that there was a breach in England because the defendants are estopped by their conduct from denying it, but an estoppel will not found a cause of action.

HODSON L.J. (after stating the facts): The plaintiffs claim that they are entitled to bring their action based on failure to deliver, and it is to be noticed that the way in which they frame their claim is this: a claim for damages for breach of contract in respect of the non-delivery at United Kingdom port. Unless the words "United Kingdom port" are surplusage, the language of the writ does not enable their claim to be covered by the rules. Order 11, rule 1 (*e*), so far as relevant, is as follows: ". . . service "out of the jurisdiction of a writ of summons or notice of a writ "of summons may be allowed by the court or a judge whenever ". . . (*e*) The action . . . is one brought against a defendant "not domiciled or ordinarily resident in Scotland or Ireland, in "respect of a breach committed within the jurisdiction of a "contract wherever made . . ." This application is based upon

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[10] (1886) 6 App.Cas. 251.

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Hodson L.J.

the contention that the claim was made in respect of a breach within the jurisdiction.

The phrase "United Kingdom port" covers more than the jurisdiction. The jurisdiction of these courts does not extend to Northern Ireland or Scotland; so that prima facie the plaintiffs are not entitled to succeed. They have succeeded before the judge, upon the footing that the true effect of the obligation which was imposed upon the defendants was to deliver at *every* United Kingdom port, not at one, although the contract was to deliver at one. The argument which was accepted by the judge was this. It is said: "You, the defendants, contracted to deliver at a "nominated port in the United Kingdom. We, the plaintiffs, "had the option of nominating a port within that range. We "would have been able to nominate a port within that range at "the stated hour—120 hours before Land's End—if the ship "had not been lost, and by your own wrongdoing you have put "us in a position where it was no longer in our power to nominate "a port in the United Kingdom within the range." Accordingly it is said that the defendants cannot be in a better position by reason of their own wrongdoing than they would have been in if the ship had been seaworthy and had been able to bring her cargo to a United Kingdom port.

It is said that it is necessary to give effect to the rule by treating this as if it were a breach within the jurisdiction; and indeed the judge upon that basis found that there was a breach as alleged within the jurisdiction. He said: "In allowing this "appeal I base myself entirely upon the narrow ground that a "contract to carry goods to any port in the United Kingdom "(with the exception of two named ports), which gives the "obligee an option to choose not later than a certain time, or "the happening of a certain event, to which port goods shall be "carried, comprises within the obligation undertaken by the "obligor, the shipowners, an obligation to deliver to each and "every port in the United Kingdom other than the excepted "ports." Later he said: "When he fails to deliver anywhere, "he has committed a breach of his obligation to deliver where he "could have been called upon to deliver, i.e., at any place at "which he could have been called upon to deliver. It does not "avail the defendants to show, through no fault of the plaintiffs, "the option was not exercised. The contract having been broken "at every port in the United Kingdom (other than the excepted "ports) there was a breach of contract committed in England."

In my judgment that is a conclusion which it is not open to the court to reach. The question is not whether a breach must be deemed to have been committed, or whether a breach must necessarily be taken to have been committed when the defendants have put themselves in the wrong, but whether a breach has been committed in the United Kingdom; and until a port in England within the jurisdiction has been nominated there was no obligation upon the shipowners of which they were in breach.

That seems to me to be the plain conclusion upon the language of the rule. It is quite true (as was pointed out by the judge) that there is no authority directly in point; but I think there is persuasive authority upon the language of the old rule, which was superseded in 1921. Order 11, rule 1, formerly read (under subheading (*e*)): "Service out of the jurisdiction of a writ of sum- "mons or notice of a writ of summons may be allowed by the court "or a judge whenever . . . The action is founded on any breach or "alleged breach within the jurisdiction of any contract wherever "made which, according to the terms thereof, ought to be per- "formed within the jurisdiction, unless the defendant is domiciled "or ordinarily resident in Scotland or Ireland." Mr. Donaldson, for the plaintiffs, pointed out that the words "according to the "terms thereof" and the words "ought to be performed within "the jurisdiction" do not appear in the present rule. The words "according to the terms thereof" do not seem to me to add anything to the words which precede it; and although I accept the submission of Mr. Donaldson that the wording of the old rule is, as it were, looking at the situation from a different point of time from the wording of the present rule, nevertheless I find no material distinction between the wording of the two rules for the purposes of the consideration of this matter.

Some authority which has been quoted by Mr. Kerr for the defendants seems to me to have a bearing upon this problem. The first case is *Bell & Co.* v. *Antwerp, London and Brazil Line*,[1] which was, of course, a decision under the old rule. "A foreign "company chartered a ship from English shipowners to take a "cargo from London to a foreign port, and by the terms of the "charterparty it was stipulated that all lighterage should be at "charterers' or consignees' risk and expense, the charterers "indemnifying the shipowners from all lighterage on cargo at the "port of discharge; but no place was specified for payment of "moneys that might become payable under such contract of

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[1] [1891] 1 Q.B. 103.

"indemnity." It was held "that such contract was not one "which, 'according to the terms thereof,' ought to be performed "within the jurisdiction, within the meaning of Order 11, rule 1 "(*e*), and therefore leave to serve notice of the writ out of the "jurisdiction in an action upon such contract against the foreign "company could not be given."

A great deal of the discussion in that case was about the place where the contract as to payment of money was to be performed; but Lord Esher M.R. in his judgment, having considered the facts of the case, made some observations which seem to me to be of general importance. He said [2]: "How, "then, does the case stand with regard to this contract to indemnify the shipowners in respect of lighterage? If the charterers "were bound to perform it out of the jurisdiction if required by "the shipowners to do so, how can it be said to be a contract "which, according to its terms, ought to be performed within "the jurisdiction?" It is to be observed that that was a case where the option was the plaintiffs' option and in that sense it is parallel with this case, in which the plaintiffs had the option to nominate their port of discharge. Lord Esher M.R. continued: "Where a contract is one which may be performed in or out of "the jurisdiction, as the case may be, I do not see how it can be "a contract which, according to its terms, ought to be performed "within any more than without the jurisdiction."

This is such a case. This is a contract which could be performed either in or out of the jurisdiction; and until the nomination of a port had been made it could not be said, in my judgment, that this was a contract to be performed within the jurisdiction. The matter was still at large.

The case cited was considered by the House of Lords in *Comber* v. *Leyland and Bullins.*[3] Lord Shand, in his speech, referred to the problem which had been considered after full arguments, in the two cases of *Bell & Co.* v. *Antwerp, London and Brazil Line*,[4] to which I have referred, and another case, to which we have also been referred, *The Eider* [5]; and he said he was clearly of opinion that the view taken by the judges in those cases as to the construction and effect of what I call the old rule was right. He continued [6]: "The result of those cases, I take it, "is practically this—that when it is shown that a plaintiff is

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[2] [1891] 1 Q.B. 103, 108.

[3] [1898] A.C. 524.

[4] [1891] 1 Q.B. 103.

[5] [1893] P. 119.

[6] [1898] A.C. 524, 533.

"entitled to require the performance of a contract in this "country, and that consequently a breach takes place in this "country, process may be served out of the country; but I hold "upon the authority of those cases, and believing them to be in "accordance with the true construction of the language used, "that the rule is limited to this, and that there is no right to "serve out of the jurisdiction where the performance of the "contract may be given either within the jurisdiction or abroad "in the option of the party who has undertaken the obligation." That was a case where the option was that of the party who had undertaken the obligation; and the learned Lord was not specifically dealing with a case where the option was a plaintiffs' option. But in referring to *Bell & Co.* v. *Antwerp, London and Brazil Line* [7] in his speech, part of which I have read, he was to my mind not doubting the validity of the view that the position would be the same if the option were a plaintiffs' option.

For the reasons I have given, supported by authority on the construction of the earlier rule, I am of the opinion that it is really impossible to come to the conclusion—which might be said to be one which justice would seek to arrive at—that there was here a claim for breach of contract within the jurisdiction. There has never been any breach within the jurisdiction because the time for nomination never arrived. If the ship was unseaworthy when she left Cuba and the owners did not take steps with due diligence to make her seaworthy before she started on her voyage, that would be a breach of contract outside the jurisdiction. Similarly, the failure to arrive at the point 120 hours before Land's End would be a breach outside the jurisdiction; but in my view there is no breach within the jurisdiction here.

Mr. Donaldson sought, both before the master and the judge, to introduce evidence to establish that a port in this country would certainly have been nominated (as we were told, I think, Hull); and no doubt there would have been available evidence to show that, as a matter of commercial practice, that nomination would have been made. We have not looked at that evidence, and I do not think that such evidence would be admissible. Even if it were admitted it would carry the plaintiffs no further; however much they might be able to say that Hull would have been the nominated port, it never was the nominated port and by that method they could not, as I see it, have extricated themselves from the difficulty which they are in, and brought themselves within the rule.

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[7] [1891] 1 Q.B. 103.

I would allow the appeal.

ORMEROD L.J. I agree. Mr. Kerr at the beginning of his argument said (and I think rightly) that the jurisdiction of the courts under Order 11, rule 1, should be administered with the greatest care, as it is a rule which tends to encroach upon the sovereignty of other nations. Bearing that in mind, one has to consider the one and only important question in this appeal, and that is whether the defendants have committed a breach of contract within the jurisdiction.

As the judge said, there is really no direct authority on this matter and the question has to be decided by considering the circumstances and the wording of the rule. The position in this case was that, by the combined effect of the charterparty and the various addenda, the obligation on the defendants was to deliver the cargo of sugar at a nominated port within the United Kingdom, subject to one or two exceptions which are not material. That obligation remained during the time the contract was in existence, and remained in that form. It could only be reduced or crystallised by the plaintiffs nominating the port at which the sugar had to be delivered when the ship had arrived at a position 120 hours from Land's End—a contingency which we know never happened. There never was any nomination, and therefore the obligation remained as it had been from the beginning.

But Mr. Donaldson asks us to say (and I think this is really the substance of his argument) that it was the intention of the plaintiffs to nominate a particular port, a port within the jurisdiction of this court: they did not nominate that port because they had no opportunity of nominating any port at all: but the defendants cannot be heard now to say that the plaintiffs did not nominate that port, because it was owing to the fault or breach of contract of the defendants that it was impossible to do so. In those circumstances the plaintiffs must be deemed to have nominated a particular port. In effect it was submitted that the defendants are estopped from denying that a port was nominated.

That is the argument which the plaintiffs put before this court. But it is not, in my view, in accordance with the terms of the rule. The rule does not say " a breach which shall be deemed " to have been committed within the jurisdiction," or " a breach

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"which the defendants are estopped from denying was committed within the jurisdiction." The rule gives power to serve out of the jurisdiction only if there has been a breach of contract within the jurisdiction. In my opinion there has not been, and I agree that this appeal must be allowed.

Appeal allowed with costs.

Solicitors: *Holman, Fenwick & Willan; Waltons & Co.*

F. R. D.

In re VERNAZZA.

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Ormerod, Willmer and Harman L.JJ.

Practice and Procedure—Vexatious litigant—Matters to be taken into consideration—"Instituted . . . legal proceedings"—Meaning—Multifarious proceedings over 24 *years arising out of same claim—Supreme Court of Judicature (Consolidation) Act,* 1925 (15 *&* 16 *Geo.* 5, *c.* 49), *s.* 51 (1).

Statute—Retroactive effect—Appeal—Whether new law applicable—Procedural point or substantive right—Vexatious litigant—New Act extending power of High Court to cover continuing proceedings already instituted by vexatious litigant—Whether Court of Appeal can vary High Court order to accord with new Act—Supreme Court of Judicature (Consolidation) Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 49), *ss.* 27 (1), 51 (1)—*Supreme Court of Judicature (Amendment) Act,* 1959 (7 *&* 8 *Eliz.* 2, *c.* 39), *s.* 1 (1).

Court of Appeal—Jurisdiction—New Act after hearing below—Whether applicable on appeal—Procedural or substantive point—Act against vexatious litigants—Supreme Court of Judicature (Consolidation) Act, 1925, *ss.* 27 (1), 51 (1)—*Supreme Court of Judicature (Amendment) Act,* 1959, *s.* 1 (1).

In 1935 V. issued a writ against a company claiming damages of £158,982 for alleged breach of contract and/or wrongful dismissal. In 1937 the action was withdrawn, following a consent judgment, and a sum in court was paid out to V. He denied that he had consented to that course, and during the succeeding 24 years, with long gaps of inactivity, he sought, by appeal to the Court of Appeal and petition for leave to appeal to the House of Lords, by writs in the Chancery Division and various consequential interlocutory proceedings, by originating summons and consequential summons in the Companies Court, to pursue his claim against the company and later against its liquidator, proceeding on two subsequent occasions to the stage of petition to the House of Lords.

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By the year 1959 all those proceedings had been disposed of by the courts; but a new action, begun in 1957, claiming the same sum of £158,982, was continuing against the estate of P. who had guaranteed the debts of the company when it went into voluntary liquidation.

On April 9, 1959, the High Court made an order, on the application of the Attorney-General under section 51 (1) of the Supreme Court of Judicature (Consolidation) Act, 1925,[1] that no legal proceedings should without the leave of the High Court or a judge thereof be instituted by V., on the ground that he had habitually and persistently and without any reasonable ground instituted vexatious legal proceedings. V. appealed against that order.

On May 14, 1959, the Supreme Court of Judicature (Amendment) Act, 1959,[2] came into force, extending by section 1 (1) the power of the High Court to make orders covering continuing proceedings instituted by a vexatious litigant in any court before the making of an order under section 51 (1).

On the hearing of V.'s appeal, the Attorney-General, by a cross-notice, asked the Court of Appeal to vary the order of the High Court of April 9, by adding thereto an order that any legal proceedings instituted by V. in any court before the making of that order should not be continued by him without leave:—

Held, (1), dismissing V.'s appeal, that whether the words "instituted . . . legal proceedings" in section 51 (1) were to be construed widely or narrowly, there was in this case ample material before the High Court to justify their taking a broad view and exercising their discretion to declare V. vexatious (post, pp. 210, 216).

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[1] Supreme Court of Judicature (Consolidation) Act, 1925, s. 51: "(1) If, on an application made by "the Attorney-General under this "section, the High Court is satisfied "that any person has habitually and "persistently and without any reason- "able ground instituted vexatious "legal proceedings, whether in the "High Court or in any inferior court, "and whether against the same per- "son or against different persons, the "court may, after hearing that per- "son or giving him an opportunity of "being heard, order that no legal "proceedings shall without the leave "of the High Court or a judge there- "of be instituted by him in any "court, and such leave shall not be "given unless the court or judge is "satisfied that the proceedings are "not an abuse of the process of the "court and that there is prima facie "ground for the proceedings."

[2] Supreme Court of Judicature (Amendment) Act, 1959, s. 1: "(1) In subsection (1) of section 51 "of the Supreme Court of Judicature "(Consolidation) Act, 1925 . . . "after the words 'in any court' "there shall be inserted the words "'and that any legal proceedings "'instituted by him in any court "'before the making of the order "'shall not be continued by him "'without such leave'. (2) In sub- "section (1) of section 31 of the said "Act of 1925 (which provides that no "appeal shall lie in certain cases) at "the end there shall be added the "following paragraph, that is to "say—'(*l*) from an order refusing "'leave for the institution or con- "'tinuance of legal proceedings by a "'person who is the subject of an "'order for the time being in force "'under section 51 of this Act.'"

Per Ormerod and Willmer L.JJ. The words "instituted . . . "legal proceedings" in section 51 (1) should not be construed so widely as to extend to the taking of any step in an action, nor so narrowly as to cover only the commencement of an action by writ. An appeal to the Court of Appeal and a petition for leave to appeal to the House of Lords might be the institution of separate proceedings, but the latter was very much in doubt (post, pp. 209, 210, 215).

(2), dismissing the cross-notice, that as the change in the law brought about by the Act of 1959 was such as to affect a substantive right already vested in V., namely, the right to continue without leave proceedings already instituted by him, the Court of Appeal had no power to vary the order of the High Court to bring it into accord with the new Act, for the power of the Court of Appeal under section 27 of the Act of 1925 to exercise the jurisdiction of and to vary an order of the High Court in accordance with a subsequent change in the law was limited to enactments affecting procedure only (post, pp. 213, 215, 216).

Quilter v. *Mapleson* (1882) 9 Q.B.D. 672 distinguished.

Colonial Sugar Refining Co. v. *Irving* [1905] A.C. 369; 21 T.L.R. 513 and *In re a Debtor* [1936] Ch. 237; 52 T.L.R. 70 applied.

Order of Divisional Court [1959] 1 W.L.R. 622; [1959] 2 All E.R. 200 affirmed.

APPEAL from Divisional Court.

CROSS-NOTICE of contention pursuant to leave granted by Court of Appeal on October 26 to serve notice out of time.

In 1935, the litigant, Anthony Vernazza, was dismissed from the employment of a company, Baburizza & Co. Ltd. On July 11, 1935, he issued a writ [1935 V. No. 655] claiming damages of £158,982 for alleged breach of contract of service and/or wrongful dismissal. The action came on for hearing before Swift J. on June 16, 1937. The defendant company had paid into court the sum of £400, and on the advice of the litigant's counsel and by agreement between counsel for both parties, the £400 was paid to the litigant, and no order was made for the payment of costs by him, the action being then withdrawn. Despite that apparent end to the action, the litigant was not satisfied, and on July 28, 1937, he gave notice of appeal. On March 10, 1938, the appeal was heard by the Court of Appeal (Greer, Slesser and Clauson L.JJ.) and was dismissed with costs, leave to appeal being refused. In the course of the discussion Greer L.J. said to the litigant: "We have heard what you say, and you have no grounds "whatever and have established no grounds whatever for setting "aside a settlement which with your knowledge and with your "authority was made by your counsel, and there is an end of this "appeal." Despite those words, the litigant persisted in the matter, and on May 23, 1938, petitioned the House of Lords for leave to appeal; but leave was refused.

That might be thought to have ended the matter and to have satisfied the litigant, but, on June 2, 1938, he started new proceedings in the Chancery Division against Baburizza & Co. by a writ [1938 V. No. 587], asking that the judgment of Swift J. be set aside, apparently on the ground that the compromise of the action had not been entered into with his consent. In the course of those proceedings, a statement of claim had been delivered which, on November 1, was ordered by Farwell J. to be struck out as being vexatious. A second statement of claim was considered on February 8, 1939, by Crossman J., and the litigant was given leave to amend certain parts of the statement of claim while other parts were struck out. On June 20, 1939, a summons to strike out the defence in that action was heard by Farwell J., and on that no order was made except that the litigant should pay the costs of the application. So the matter went on. There were various other proceedings, until June, 1940, for leave to deliver interrogatories which went up by way of petition to the House of Lords. The matter then remained dormant for 17 years until June 25, 1957, when a summons was taken out by the defendants to dismiss the action for want of prosecution. That came before Harman J. in October, 1957, and the action was dismissed for want of prosecution. The litigant appealed to the Court of Appeal and that appeal was dismissed. He then petitioned the House of Lords for leave to appeal and that petition was refused.

Then, on July 24, 1958, he once again commenced proceedings against the defendants by writ [1958 V. No. 705], again asking for the judgment of Swift J. to be set aside, apparently on exactly the same grounds as set forth in his previous action. That was dismissed by Wynn-Parry J. on December 12, 1958, as being frivolous and vexatious and an abuse of the process of the court. Apparently, there was no appeal against that decision.

Thus, by July, 1958, there had been two separate actions to set aside the judgment of Swift J., one of which had lain dormant for some 17 years, and both of which had been instituted after Greer L.J. had intimated in the clearest possible terms that there was no ground of appeal from the original order of Swift J. made in the action which was compromised.

In addition, there were other activities by the litigant as follows: Baburizza & Co., the company against which he was proceeding, went into voluntary liquidation in 1937. On February 10, 1938, the litigant proceeded by originating summons in the Companies Court against the company [No. 00145 of 1938], having already sent in his proof of debt which had been rejected by the liquidator. By his originating summons he asked that the liquidator's rejection of his proof of debt be reversed and that the proof be allowed. That matter stood over pending the hearing of the action which had been started in the Chancery Division. Then, on November 12, 1938, he asked for a declaration that the liquidator was guilty of misfeasance and breach of trust. That summons was again stood over.

On March 7, 1944, the litigant applied to have his proof of debt allowed in full. That was adjourned on June 24, 1957, pending the result of the Chancery action. On November 27, 1958, he served notice of motion to restrain the liquidator of the company from interfering in the winding up of the company.

After the Chancery action had been dismissed for want of prosecution in October, 1957, the litigant applied for all the three adjourned summonses in the Companies Court to be heard; and they came before Vaisey J., who, on December 2, 1958, dismissed them all. A notice of motion and a supplementary and amended notice of appeal were subsequently served by the litigant; but his original motion and his appeal were dismissed by the Court of Appeal in June, 1959, on the ground that the litigant had failed to supply the court with the documents as required by the Rules of the Supreme Court.

Another matter in which the litigant was concerned was the following: On the winding up of Baburizza & Co. one Petrinovic had guaranteed the company's liability; and in 1951 he died in the United States, leaving a considerable estate. On July 17, 1952, the litigant entered a caveat in the probate proceedings against his estate; that caveat was removed, and a further caveat was entered and later removed. By February, 1956, the estate duty and interest payable on the Petrinovic estate had reached a very high figure; but his executors, the Chase Manhattan Executor and Trustee Corporation, were unable to pay either duty or interest because they were unable to obtain money from the estate owing to the fact that on March 27, 1957, the litigant issued an originating summons [1957 No. 550] in the Chancery Division against the executors; and on July 12, 1957, the hearing of that summons was adjourned to enable a writ to be issued in lieu of it. On July 27, 1957, the writ [1957 P. No. 1355] was issued; the statement of claim was delivered on October 31, 1957, again claiming the sum of £158,000 damages against the Petrinovic estate for wrongful dismissal; and on November 15, 1957, the defendants requested further and better particulars of the statement of claim.

Those proceedings were continuing when, on April 9, 1959, the Attorney-General applied to the Divisional Court of the Queen's Bench, asking that the litigant be declared vexatious in accordance with the provisions of section 51 (1) of the Supreme Court of Judicature (Consolidation) Act, 1925. The court (Lord Parker C.J., Donovan and Salmon JJ.)[3] made the order asked for, namely, that no legal proceedings should without the leave of the High Court or a judge thereof be instituted by the litigant Vernazza, on the ground that he had habitually and persistently and without any reasonable ground instituted vexatious legal proceedings.

On May 14, 1959, the Supreme Court of Judicature (Amendment) Act, 1959, received the Royal Assent. By section 1 (1) the Act gave the High Court the new power to order that no legal proceedings should, without the leave of the High Court or a judge thereof, be *continued* by a litigant, the subject of an order under section 51 (1) of the Act of 1925. On May 21, 1959, the litigant entered a notice of appeal against the order of the Divisional Court; and on October 26, 1959, the Attorney-General moved the Court of Appeal (Morris, Romer and Willmer L.JJ.) for leave to serve on the litigant out of time a notice that on the hearing of his appeal the Attorney-General would ask the Court of Appeal to vary the order of the Divisional Court by adding thereto an order that any legal proceedings instituted by the litigant in any court before the making of the order of April 9, 1959, should not be continued by him unless he obtained the leave of the High Court or a judge thereof, and satisfied the court or judge that such legal proceeding was not an abuse of the process of the court, and that there was a prima facie ground for such proceeding. The Attorney-General on that motion told the court that the serious matter of concern was the litigant's continuing action against the Chase Manhattan Executor and Trustee Corporation.

The court granted leave to the Attorney-General to serve a notice of contention out of time, and at the same time made an order directing the Official Solicitor to inform the litigant that if he did not wish to have counsel of his own choice on the hearing of the appeal, counsel and solicitors would be assigned to him.

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[3] [1959] 1 W.L.R. 622; [1959] 2 All E.R. 200.

Arthur Bagnall for the litigant on his appeal. The phrase "instituted . . . legal proceedings" in section 51 (1) has never been judicially interpreted, but in its context it should be construed narrowly to mean the taking of any step seeking substantive relief or asserting a separate cause of action by an originating procedure such as a writ or originating summons, that is, taking the first step which gives a case a number and a title, or, put colloquially, "setting the ball rolling." A summons for directions or discovery, the administration of interrogatories, the adding of a new defendant or a new ground of action, interlocutory steps ancillary to the main action or to preserve the status quo, and an appeal to the Court of Appeal or a petition for leave to appeal to the House of Lords would on that narrow construction merely be continuing proceedings already instituted.

If that is the right construction, section 51 (1) requires the court to look at each separate proceeding instituted by a litigant and select from them those which satisfy all the conditions precedent set out in the subsection. First, the court must look only at the institution of proceedings and not at the prosecution of proceedings already on foot by the taking of interlocutory steps or pursuing the right of appeal.

[HARMAN L.J. On a petition for leave to appeal, or on an appeal to the House of Lords, an action loses its number and title and everything else.]

Secondly, the institution of proceedings must satisfy both an objective and a subjective test: it must be "without reasonable "ground" and, looked at from the outside, bound to fail; and it must be "vexatious," that is, not instituted bona fide to assert a right but maliciously to vex or annoy the defendant.

[WILLMER L.J. But surely it is vexatious if it vexes a person against whom the litigant is proceeding? Is that a subjective test?]

All litigation vexes; but there must be something more than "without reasonable ground." It is not enough to show that the action must fail; it must also be vexatious. Thirdly, the court must be satisfied that the institution of proceedings has been "habitual and persistent," though it is difficult to find a difference in the meaning of those words, and "persistent" may be tautologous.

None of those conditions precedent, all of which are necessary for the exercise of the court's discretion to make the order under section 51 (1), were established in the present case, and the court's approach to the matter, by taking a sweeping view of a long series of proceedings which had wholly failed, was incorrect. The action compromised before Swift J. could not be said to be vexatious, and once the litigant refused to accept that compromise his only course was to start a separate action in the Chancery Division to have it set aside. The Chancery action was the basis of all the subsequent proceedings, and if it was vexatious the litigant must fail on the merits; but if it was not vexatious, then all the subsequent proceedings, in the Companies Court and elsewhere, were steps taken to preserve the status quo. The only vexatious proceeding, on the narrow construction, was that dismissed by Wynn-Parry J.

[HARMAN L.J. Is it not vexatious deliberately to allow a Chancery action to go to sleep for years and then use other means of harassing your enemy in the Companies Court?]

Both actions went to sleep for years; but to be dilatory is not to be vexatious. It is to be noted that, though he has been trying since 1935, this litigant has never had his action tried on its merits.

Sir Reginald Manningham-Buller Q.C., A.-G. and *J. R. Cumming-Bruce* in support of the order appealed from. The word "proceedings" in section 51 (1) should not be construed as if it were synonymous with "action." The adjective "vexatious" is applied in its context to "legal proceedings" and not to "legal "actions." The Rules of the Supreme Court, Ord. 1, rr. 1 and 2, show that an action is only one kind of "proceeding." There is no justification for construing that word in the narrow sense of instituting an action by writ or originating summons. The words "legal proceedings" are deliberately wide, and proceedings are instituted when a party takes a distinct step in an action. It is at least arguable that a petition for leave to appeal to the House of Lords is the institution of proceedings within section 51 (1). The Divisional Court was right to look at the whole history of this man's litigation in order to determine whether the legal proceedings were vexatious.

J. R. Cumming-Bruce following. Section 51 (1) envisages a plaintiff who may neither commence an action nor take any step in an action already begun without leave. It is an essential ingredient of the institution of legal proceedings that the step taken, if successful, will set in train the machinery of the court, with the effect that the court will either grant relief or compel the opposite party to take some procedural step, but on that construction a summons for leave to administer interrogatories would be the institution of proceedings.

Bagnall in reply. If the wide construction is right, it would follow that a person the subject of an order under section 51 (1) would have to go to a judge for leave for every step he desired or was required to take in an action. The judge could not give permission in advance for all the normal procedural steps, nor give leave nunc pro tunc, for he is enjoined by the Act to consider "the proceedings."

Sir Reginald Manningham-Buller Q.C., A.-G. on the cross-notice. The amending Act of 1959 has enlarged the powers of the High Court so that it could now prevent this litigant from continuing without leave the proceedings—viz., the action against the estate of P.—which he had started before the date of the Divisional Court's order. The question of law on the cross-notice is whether this Court of Appeal can now vary the order of the High Court to bring it into accord with the new Act and make an order which the High Court did not at the time of the hearing before it have the power to make. The new Act of 1959 merely alters future procedure by fettering actions taken by certain litigants; and *Quilter* v. *Mapleson*,[4] *per* Jessel M.R. and Bowen L.J., is authority for the proposition that this court can stand in the shoes of the High Court and make the order which the High Court could not have made in April, 1959: see section 27 (1) of the Judicature Act of 1925 defining the powers of this court. In *Quilter's* case [4] the change in the law gave new relief to the tenant and this court gave effect to the changed law in his favour. Here the legislature has given extended relief to the victims of a vexatious litigant and therefore this court can vary the High Court order to accord with the changed law.

Bagnall on the cross-notice. It is conceded that the Court of Appeal may make an order on the basis of the new law as it exists at the time when the appeal is heard where the intervening change affects remedies or other procedural matters. But this court has no such jurisdiction if the change in the law affects substantive rights already vested in a subject; and the destruction of one of the subject's most important rights, that of free access to the courts without the fetter of having to obtain leave, is a matter of substantive right. *Quilter* v. *Mapleson* [4] was a decision on a change in the law affecting procedure only, and is distinguishable. In *In re a Debtor*[5] Lord Wright M.R.[6] stated the principle applicable in the present case, that where the new law affects substantive rights the Court of Appeal must deal with the law as it existed when the matter was heard at first instance; and in *Colonial Sugar Refining Co. Ltd.* v. *Irving*[7] the Privy Council held that to deprive a man of his right of appeal to the Judicial Committee and substitute a right of appeal to the court in Australia was to interfere with a substantive vested right. It is to be noted that the amending Act of 1959 by subsection (2) of section 1 provides that if leave is refused to a litigant to continue an action already begun by him, "no appeal shall lie." That is a very serious interference with the freedom of access to the courts. This court has therefore no power to vary the order of the High Court on any footing other than that of the law as it was when the High Court made this order.

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[4] (1882) 9 Q.B.D. 672, 676, 678, C.A.

J. R. Cumming-Bruce in reply on the cross-notice. A litigant who is the subject of an order under section 51 (1) is not deprived of access to the courts. All that he is required to do is to take the one interlocutory step of obtaining leave. It is not correct to attach to that procedural necessity the description of "substantive right." The decision of the Privy Council in the *Sugar Refining* case[7] is difficult to reconcile with the English decisions unless it can be said that the substituted right of appeal to the Australian court was different in kind from that to the Privy Council.

Further, it is submitted that the Act of 1959, designed to affect pending actions, is either expressly or by necessary implication intended to have retrospective effect.

[HARMAN L.J. If it is not designed to affect pending actions it is useless against the present litigant and can only operate for the future. It may be that the Act has not achieved what was intended.]

The Judicature Act of 1925 as amended by the Act of 1959 has the effect that from the date when the new Act came into force it is open to the court to look at the situation as it is when the application is made, and to prohibit (a) future institution of proceedings, and (b) further continuation of proceedings presently pending: see *per* Evershed M.R. in *Hutchinson* v. *Jauncey*[8] that "if the necessary intendment of the Act is to affect pending "causes of action, this court will give effect to the intention of "the legislature even though there is no express reference to "pending actions."

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[5] [1936] Ch. 237; 52 T.L.R. 70, C.A.

[6] [1936] Ch. 237, 242–243.

[7] [1905] A.C. 369; 21 T.L.R. 513.

[8] [1950] 1 K.B. 574, 579; 66 T.L.R. (Pt. 1) 195; [1950] 1 All E.R. 165, C.A.

[ORMEROD L.J. This court is not now concerned with the law as it is or as it was, but only with its own power to vary an order made by the High Court when the law was different. If this litigant could not appeal from an order refusing him leave, the Attorney-General could not come to this court on his cross-notice. He would have to go to the Divisional Court, and it may be that he can still do so; but as this matter has been brought to this court by the litigant, Lord Wright has said that this court cannot interfere, because the change in the law affects substantive rights.]

Bagnall in reply. The "pending action" here, for the purpose of the principle stated by Lord Wright, is the appeal which this court is now hearing.

ORMEROD L.J. stated the circumstances in which the case came before the court, as set out above, and continued: In the course of his judgment in the Divisional Court Lord Parker C.J. said [1]: "As long ago as 1935 the respondent [Vernazza] was "obsessed with the idea that he was owed £158,982 0s. 6d. for "services rendered to a company. He brought proceedings "claiming that sum in the King's Bench Division, and those "proceedings came before Swift J. At that time the present "respondent's leading counsel had advised him that he had no "case, but thanks to the generosity of the defendant company, "judgment was entered by Swift J. for the defendants without "costs, on the understanding that they would allow the plaintiff "(the present respondent) to take out and retain the £400 that "was in court. Notwithstanding that, he persisted in this "delusion. He has since brought actions in the Chancery "Division and the Queen's Bench Division, claiming in one form "or another that that consent judgment ought to be set aside, "and that he is still owed this £158,000. During the course of the "history of the matter the company concerned went into voluntary "liquidation, and there followed in the Companies Court some "five summonses; these, it is true, were to a large extent directed "to retaining the status quo and preventing the company from "distributing the assets, but all were taken out under this

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[1] [1959] 1 W.L.R. 622, 623; [1959] 2 All E.R. 200.

"delusion that the respondent was owed some £158,000." Then the Lord Chief Justice went on to say that, in his opinion, it was just the sort of case which the section had in mind and in which an order should be made, and, accordingly, an order was made.

The order was made in pursuance of section 51 (1) of the Supreme Court of Judicature (Consolidation) Act, 1925. [His Lordship read the subsection, and continued:] Mr. Bagnall's submission was that the Divisional Court in considering the case had not approached it from the proper angle. What they had done was to take what he described as a sweeping view of the various actions which the appellant had taken since 1935 and had come to the conclusion on a general survey of those matters that this was a case for an order. The submission Mr. Bagnall put forward was, first, that the wording of the Act deals with actions instituted "without any reasonable ground," and which are "vexatious legal proceedings." Therefore he submitted that, in order to be satisfied before an order is made that the conditions of the section have been complied with, it is necessary to consider first from the objective point of view whether the proceedings were instituted without any reasonable ground, and that each separate action should be considered and decided on accordingly. Secondly, the question should be considered as to whether they were vexatious, and that was a subjective matter, and really had to be decided by considering whether the appellant was acting maliciously or otherwise than in good faith.

If I may deal first with that submission, in my opinion it is not the right way to look at the matter. The words of the section are "without any reasonable ground instituted vexatious legal "proceedings." They are referring to legal proceedings, and the question is not whether they have been instituted vexatiously but whether the legal proceedings are in fact vexatious. I suppose most proceedings are vexatious to the persons against whom they are directed, and, therefore, the further question has to be considered whether, though they may be vexatious, they have been brought without any reasonable ground. That is a matter for the court to decide. But if, in the opinion of the court, the proceedings are vexatious and there is no reasonable ground for bringing them, then they are within the category at which this section aims. The second contention made by Mr. Bagnall on the question was that in the present case there was no sufficient evidence that any proceedings which have been brought by this appellant were "persistently" vexatious. He submitted that the proper construction of the words "instituted legal proceedings" must be the commencement of an action by a writ or other proper procedure, and that nothing else can be regarded as the institution of proceedings. In that sense he said that in this particular case the two actions in the Chancery Division, brought to set aside the judgment of Swift J., were proceedings which have been instituted within the meaning of this section, but that any of the other matters, such as the various summonses in the liquidation, not being actions which had been commenced by writ, were merely incidental to the actions already commenced, or, as he put it, instituted. He said, in those circumstances, that while prepared to agree that the second action which the appellant commenced against the company to set aside the judgment of Swift J. was vexatious, it was the only one properly to be so described, and, therefore, in the circumstances, not sufficient to justify this order being made.

The Attorney-General, on the other hand, submitted that the term "instituted proceedings" carried a very much wider construction than the construction for which Mr. Bagnall contended. His submission was that taking any step in an action was the institution of proceedings. Mr. Cumming-Bruce, in the course of his submission to the court, said that it was a step taken which, if successful, would set in train the machinery of the court with the effect that the court would grant relief or compel the other party to take a procedural step. That, of course, puts an extremely wide construction on the section, and would operate to bring within its ambit even a summons for directions. For my part, I am not prepared, as I have already intimated, to put so wide a construction as that on the words of this section, but I think that the words admit of a wider construction than that for which Mr. Bagnall contends, which is that the words "institution of proceedings" mean nothing more than the commencement of an action by a writ.

In this particular case there are various matters which have been referred to which might or might not be said to constitute the institution of proceedings. There are two actions which have been dealt with which, by common consent, are proceedings which have been instituted. There are a number of appeals to this court and, if not appeals to the House of Lords, petitions for leave to appeal to the House of Lords. I think the question whether petitions to the House of Lords for leave to appeal amount to the institution of proceedings is a question which is very much in doubt. The question also arises whether an appeal to this court can be regarded as a separate institution of proceedings other than an institution of proceedings in the original action. It is probably unnecessary to decide that question here, but I lean to the view that an appeal to this court from a decision of the High Court or from any other court is the institution of a separate proceeding. But apart altogether from the question of appeals, there are the summonses to which I have referred which were taken out in the liquidation as part of the attempt by the appellant to obtain the money which he alleged was owing to him by the company.

So far as those proceedings are concerned, Mr. Bagnall says in the first place that they are not proceedings which were instituted but are really matters of procedure. He says, further, that in any event they cannot be regarded as vexatious, because they were proceedings which it was essential that the appellant should undertake in order to keep his rights alive in the liquidation, pending the trial of the action which he had begun to set aside the judgment of Swift J. Of course, if he was justified in commencing that action and justified in conducting it as he did, it may very well be that he was justified in taking out the various summonses in the liquidation to protect his rights. On the other hand, it appears to me that it may very well be said that the action which was started by the appellant on June 2, 1938, after the petition to appeal to the House of Lords in the original action had been refused, was a vexatious action and an action for which there was no ground, that being an action by the appellant which was allowed to proceed for a period of 17 years from 1940 to 1957.

Those are all matters which were present to the mind of the Divisional Court at the time they made their decision. Although Lord Parker C.J. did not say in terms that he took all those matters into consideration, I think he indicated in his judgment that he had all those matters in mind in considering whether or not this appellant came within the definition of a vexatious litigant. I think it is beyond question that there was ample material before the Divisional Court which would justify them in exercising their discretion in the way they did in making this order. In those circumstances, in my view, there is no justification for the submission on the part of the appellant that the Divisional Court was in error, or that they approached the matter from the wrong angle. Reading the judgment of Lord Parker

C.J.,[2] I find nothing which would justify this court in interfering with the order made, and I would dismiss the appeal.

However, that is not the end of the matter, because the respondent [the Attorney-General] has put in a cross-notice asking for the order of the Divisional Court to be varied by including the provisions of the Act of 1959. That Act, which is " An Act " to amend the law relating to the restriction of vexatious " actions," came into force on May 14, 1959, and it provides that there should be inserted in subsection (1) of section 51 of the Act of 1925 after the words " in any court " the words " and " that any legal proceedings instituted by him in any court before " the making of the order shall not be continued by him without " such leave." In other words, where section 51 (1) of the Act of 1925 gave power to the court to make an order to prevent the litigant instituting further proceedings without the consent of the court, the Act of 1959 extended that power and empowered the court to prevent the litigant from continuing any proceedings already instituted without the consent of the court. The Attorney-General has argued that, as the matter has come before the Court of Appeal, this court has power to vary the order on the ground that the Divisional Court would, if it were dealing with the matter now, have power to deal with it in that way. In support of that submission, section 27 (1) of the Act of 1925 was relied on, which reads as follows: " Subject as otherwise provided " in this Act and to rules of court, the Court of Appeal shall " have jurisdiction to hear and determine appeals from any " judgment or order of the High Court, and for all the purposes " of and incidental to the hearing and determination of any appeal, " and the amendment, execution and enforcement of any judg-" ment or order made thereon, the Court of Appeal shall have all " the power, authority and jurisdiction of the High Court . . . " It was submitted that in consequence this court had power to say that by reason of the Act of 1959 the court had power to make an order prohibiting the appellant from continuing any proceedings which he had instituted without leave of the court. It was contended that if the Court of Appeal had the power of the High Court, it had the power to vary the order of the Divisional Court in accordance with the Act of 1959. In support of that contention the Attorney-General referred to *Quilter* v. *Mapleson*.[3] That was an action to recover demised property under a proviso of re-entry for breach of a covenant to insure. The defendant claimed relief under the statute. The plaintiff obtained judgment on July 4, 1881. On August 4 the defendant appealed, and a stay of proceedings was granted and continued, so that the plaintiff never obtained possession. On January 1, 1882, the Conveyancing and Law of Property Act, 1881, came into operation. After that Act came into operation the appeal came on to be heard, and it was held that section 14 (2) of the Conveyancing and Law of Property Act, 1881, was not confined to breaches taking place after the Act came into operation, but extended also to breaches committed before the Act, and to proceedings pending when the Act came into operation, and that as the landlord had not obtained possession, but the action was still pending, there was jurisdiction to grant relief to the tenant under that subsection. It was also held that, "assuming the judgment of the court below to have been "correct according to the law as it then stood, the Court of "Appeal could grant to the tenant the relief to which he was "entitled according to the law as it stood at the hearing of the "appeal, since the general orders provide that appeals shall be "by way of rehearing, and give power to the Court of Appeal not "merely to make any order which ought to have been made by "the court below, but to make such further or other order as the "case may require."

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[2] [1959] 1 W.L.R. 622, 623.

[3] (1882) 9 Q.B.D. 672.

On the strength of that case, it was argued that the court in this case had the power to vary the order to bring it into accord with the terms of the Act of 1959. The answer of Mr. Bagnall to that submission was that such may very well be the position with regard to matters of procedure, but it is not the position when the effect of the order would be to take away a right which was vested in a litigant. The argument was that the subject had the right to come to the court and have his complaint heard. To take away that right under section 51 (1) of the Act of 1925 is, in effect, to deprive him of something already vested in him. For this court now to vary that order in accordance with the Act of 1959 would be further to interfere with the rights vested in the appellant.

Reference was made to the judgment of Lord Wright M.R. in *In re a Debtor*,[4] when he said: "Counsel for the debtor relied on "*Quilter* v. *Mapleson*.[5] That, however, was a case merely "dealing with matters of procedure or remedies to which a "different rule applies. It is not necessary to quote any

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[4] [1936] 1 Ch. 237, 242; 52 T.L.R. 70.

[5] 9 Q.B.D. 672.

"authority for that distinction save what was said by Jessel "M.R. in *In re Joseph Suche & Co.*[6]: 'It is a general rule that "'when the legislature alters the rights of parties by taking away "'or conferring any right of action, its enactments, unless in "'express terms they apply to pending actions, do not affect "'them. It is said that there is one exception to that rule, "'namely, that, where enactments merely affect procedure and "'do not extend to rights of action, they have been held to apply "'to existing rights, and it is suggested here that the alteration "'made by this section [i.e., section 10 of the Judicature Act, "'1875] is within that exception. I am of opinion that it is "'not.'" Later Lord Wright said[7]: "Thus while an appellate "court is able, and bound, to give effect to new remedies which "have been introduced by enactments passed after the order "appealed from was made by the court of first instance, yet with "regard to substantive rights it is well established that the appellate court must give effect to the same law as that which was in "force at the date of the earlier proceeding. That is recognised "by Ord. 58, r. 4, which provides that even in cases where the "proceeding in the Appeal Court is a rehearing. 'The Court of "'Appeal shall have power to draw inferences of fact and to give "'any judgment and make any order which ought to have been "'made.' A matter of substantive right which has become res "judicata cannot be upset by a subsequent general change of the "law, in the absence of precise intention to make the change so "retrospective being evidenced in the Act."

The submission of Mr. Bagnall in this case is that this is a substantive right vested in the appellant, and, relying on the words of Lord Wright M.R., he submits that this court should not interfere to vary this order. We were also referred to a decision of the Privy Council in *Colonial Sugar Refining Co. Ltd.*,[8] which dealt with the right of appeal to the Privy Council, although so far as the Australian States were concerned, that right of appeal had been abolished and a right of appeal to the High Court of Australia had been substituted. It was held by the Privy Council that if the right had become vested, that is to say, if at the time of the action there was a right of appeal to the Privy Council, the fact that the Act abolished such appeals did not alter the position and the appellant there had a right of appeal.

In these circumstances, I am of opinion that this cross-notice must fail. It appears to me that this is a case where there is a right vested in the appellant, and that, having regard to the words of Lord Wright M.R., the Court of Appeal should not interfere to vary an order such as this made in accordance with the law as it existed when it was made. It may be—I pass no opinion on it—that the Attorney-General may go again to the Divisional Court and obtain an order in the terms of the Act of 1959. That is a matter which is not at present before this court. I would dismiss both the appeal and the cross-notice.

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[6] (1875) 1 Ch.D. 48, 50.

[7] [1936] 1 Ch. 237, 243.

[8] [1905] A.C. 369; 21 T.L.R. 513.

WILLMER L.J. I am of the same opinion, and I venture to add a few words of my own only because of the importance of the matter which has been discussed.

Mr. Bagnall's argument which, if I may say so, he presented to us in a most persuasive manner, appeared to me to rest on two propositions, one of law relating to the construction of the Judicature Act of 1925, and the other of fact, neither of which I feel able to adopt. So far as the construction of the Act is concerned, he has pointed out, quite rightly, that what section 51 (1) of the Act of 1925 is dealing with is a person who has "habitually and persistently and without any reasonable ground instituted vexatious legal proceedings." But, according to his argument, the words "instituted proceedings" must be given what seems to me a very narrow meaning. Virtually, Mr. Bagnall would restrict those words to the commencement of a fresh action by the issue of a new writ. As I understand his argument, nothing except that is aimed at by the section of the Act.

Mr. Bagnall's second proposition, following on that construction of section 51, is that there have, after all, only been very few separate proceedings, as so defined, which have been instituted by the appellant. He has submitted to us that the commencement of what I may call the 1938 action could not be said to be vexatious or without reasonable cause. The proceedings in the Companies Court and the proceedings in relation to the estate of Mr. Petrinovic can only, according to Mr. Bagnall's argument, be regarded as by-products of the 1938 action, that is to say, as steps taken merely for the purpose of preserving the status quo until the determination of that action. Thus it is only when one gets to 1958, when the appellant commenced the action in the Chancery Division which was dismissed by Wynn-Parry J., that Mr. Bagnall says there is any question of a vexatious action being commenced. That being so, the litigant has only once instituted proceedings vexatiously and, therefore, it cannot be said that he is a person who has "habitually and persistently" done so, and consequently the section of the Act does not apply.

As I said at the beginning, I do not feel disposed to accept either of the propositions on which that argument rests. It seems to me that the construction of the section which we are invited to adopt by Mr. Bagnall is much too narrow. At the same time, I share the view already expressed by my Lord that the alternative construction suggested to us by the Attorney-General and by Mr. Cumming-Bruce is much too wide. I do not think that this is an occasion which makes it necessary to attempt the almost impossible task of drawing an exact line between that which does and that which does not amount to "instituting" proceedings. Speaking for myself, I should have thought that there is much to be said for the view that, when one institutes an appeal in an action which has already been disposed of, one can fairly be said to be instituting proceedings, even though the title of the action and its number may be the same when it gets to the Court of Appeal as in the court below. If that is a correct view, or anything like a correct view, then it must be clear that in the 20 years or so which have elapsed since the dismissal of the original action there have been numerous occasions when proceedings have been "instituted."

Were they then "vexatious" proceedings? As to that, it seems to me that, ever since March 10, 1938, the day on which the Court of Appeal gave judgment in the original action, and the day on which Greer L.J. made the remarks which my Lord has already read, there has been no possible reason for the institution of fresh proceedings by Vernazza arising out of his claim against Baburizza & Co. Ltd. That is enough to dispose of the submission of fact which is so important for Mr. Bagnall's argument, namely, that the institution of the 1938 action was not vexatious. It seems to me that there was abundant evidence before the Divisional Court which would justify them in coming to the conclusion that the institution of that action, involving as it did the consequential institution of a number of other proceedings and the prosecution of a number of appeals, gave rise to the institution of vexatious legal proceedings which over the years may fairly be said to have become "habitual" and "persistent." In such circumstances, it appears to me quite impossible to say that the Divisional Court were not well entitled to come to the conclusion that they did.

With regard to the cross-notice put in by the Attorney-General, I confess that at first sight I was much attracted by the argument that it was competent for this court to apply the provisions of the Act of 1959. It appeared to me at first sight that there was much force in the argument that the effect of section 27 of the Act of 1925 is to put this court into the position of the High Court, that is to say, to put us in a position in which we would stand, as it were, in the shoes of the High Court as though the High Court were sitting and giving judgment today. On that basis it seemed to me that it would be our duty to exercise today the powers of the High Court as they exist today. But Mr. Bagnall, in his argument to the contrary, has persuaded me that that is a wrong view. I am satisfied, as a result of his argument, that the change of law effected by the Act of 1959, so far as the powers thereby conferred are concerned, is such as to affect the substantive rights of a man in the position of Vernazza. In such circumstances, the principle stated by Lord Wright M.R. in *In re a Debtor*,[9] to which my Lord has already referred, applies with full force. In the circumstances, I have come to the conclusion that it is impossible for us to do other than apply the law, and give effect to the substantive rights of the appellant, as they stood at the date of the hearing before the Divisional Court. For these reasons, I agree that both the appeal and the cross-notice should be dismissed.

HARMAN L.J. I agree. I desire to reserve my opinion as to what exactly may be meant by the words "institution of legal "proceedings." I am of opinion that even the narrowest view would be enough to constitute the plaintiff's actions vexatious litigation. There have been two writs and three originating summonses which are clearly, on any view, the institution of proceedings. They are all part of the vendetta by means of which for 20 years this man has harassed the company, its liquidator, its principal shareholder, and his personal representative. The Divisional Court took a broad view of the matter, and I think they were perfectly right to take such a view.

On the other point, I do not feel that Lord Wright's decision is very satisfactory, because there are always two sides to a question. It seems to me that in *Quilter* v. *Mapleson*[10]—Sir George Jessel's case—it was the landlord who had a vested right and who lost it by a subsequent judgment: it is hard to see why it was more procedural than Lord Wright's case [*In re a*

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[9] [1936] 1 Ch. 237, 242–243.

[10] 9 Q.B.D. 672.

Debtor [11]. All the same, I do not think it would be right for me to say that I should not have followed Lord Wright's opinion in a matter of this kind. I, therefore, agree with my brethren on both points.

Appeal and cross-appeal dismissed.
Leave to appeal to the House of Lords refused to both parties.

Solicitors: *Official Solicitor; Treasury Solicitor.*

M. M. H.

[11] [1936] 1 Ch. 237.

WEXLER *v.* PLAYLE (VALUATION OFFICER) AND ANOTHER.

[LVC/1883/1957.]

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Dec. 8, 9.

Morris, Willmer and Harman L.JJ.

Rates and Rating — Assessment — Rateable value — Dwelling-house — Ascertainment of gross value by reference to hypothetical 1939 *rent on basis of landlord's covenant to bear "the cost of the repairs . . . "necessary to maintain the hereditament in a state to command "that rent"—Hereditament in state of disrepair at time of valuation—Whether relevant to assessment—Meaning of "state"—Valuation for Rating Act,* 1953 (1 *&* 2 *Eliz.* 2, *c.* 42), *ss.* 2 (2), 3 (*a*) (*b*).

Lands Tribunal—Evidence—Fresh evidence—Refusal to admit evidence relevant to inquiry after conclusion of hearing and before delivery of reserved decision—Whether discretion judicially exercised—Lands Tribunal Rules, 1956 (*S.I.* 1956, *No.* 1734), *rr.* 31, 34, 45 (1).

The Valuation for Rating Act, 1953,[1] by section 2 (1) and (2), provides that the gross value of a hereditament which is a dwelling-house shall be an amount equal to the rent at which the house in

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[1] Valuation for Rating Act, 1953, s. 2: "(1) For the purpose of making "or altering the first valuation lists "made after the passing of this Act, "the gross value for rating purposes "of a hereditament which is either a "dwelling-house or a private garage "or private storage premises (as hereinafter defined respectively) shall "not be ascertained by reference to "the definition of gross value in section 68 of the Rating and Valuation "Act, 1925 (hereafter in this Act "referred to as 'the Act of 1925') "or in section 4 of the Valuation "(Metropolis) Act, 1869 (hereafter "in this Act referred to as 'the Act "'of 1869'), but shall be an amount "equal to the rent specified in the "next following subsection . . . (2)

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question "might reasonably have been expected on or about "June 30, 1939, to let from year to year, if the . . . landlord had "undertaken to bear the cost of the repairs and insurance, and the "other expenses, if any, necessary to maintain the hereditament "in a state to command that rent." By subsection (3): "it shall "be assumed—(*a*) that the hereditament is subsisting on and about "the said June 30 in the state in which it actually subsists at the "time of valuation."

A tenant claimed that he was entitled to a reduction in the valuation for rating of a flat in London occupied by him since 1948, on the ground, inter alia, that at the time of valuation, namely, March 30, 1957, the flat was in a state of disrepair. While admitting that the defects were readily reparable, he contended that section 2 of the Valuation for Rating Act, 1953,[1] required that the gross value should be fixed by reference to the rent which the flat would have been expected to command on June 30, 1939, if at that date it was in the same state of disrepair as it actually was at the time of valuation in March, 1957, and that on its true construction section 2 (2) contemplated the hypothetical landlord and tenant fixing a rent on the basis that the tenant took the premises in their existing state of repair, and the landlord covenanted to do only such repairs as would prevent them from getting into a worse state. The flat in question had been let in 1934 at a known rent but was vacant on June 30, 1939.

The Lands Tribunal, having found the 1939 rent by taking into account the 1934 rent and the rents of other comparable flats, rejected the tenant's submission on section 2.

The tribunal also refused applications by the tenant, made after the conclusion of the hearing but before the delivery of the tribunal's written decision, for the admission of further evidence relevant to the inquiry as to the merits of comparable flats. On appeal by the tenant:—

Held, (1) that the tribunal had not erred in law. Subsection (2) imported the notion of a reasonable landlord and tenant proceeding on the basis that the landlord's covenant to repair would include an obligation to put the premises into repair before the tenant entered into possession; and the fact that there were at the relevant date reparable and temporary defects in the property ought not to be taken into account in arriving at the hypothetical rent which was the basis of rateable value (post, pp. 235, 239).

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[1] "The said rent is that at which the "hereditament in question might "reasonably have been expected on or "about the thirtieth day of June, "1939, to let from year to year if the "tenant had undertaken to pay all "usual tenant's rates and taxes and "if the landlord had undertaken to "bear the cost of the repairs and "insurance, and the other expenses, "if any, necessary to maintain the "hereditament in a state to command "that rent. (3) For the purposes of "the last preceding subsection it shall "be assumed—(*a*) that the hereditament was subsisting on and about "the said thirtieth day of June in "the state in which it actually subsists at the time of valuation; and "(*b*) that the locality in which the "hereditament is situated was on and "about the said day in the same "state, as respects the other premises "situated in that locality and (subject "to the next following subsection) as "respects the occupation and use of "those premises, as respects the "transport services and other facilities available to persons living or "working in the locality, and as "respects other matters affecting the "amenities of the locality, as it is at "the time of valuation."

Semble. The concluding words of subsection (2) "to maintain "the hereditament in a state to command that rent" govern only the words "the other expenses, if any," which immediately precede them, and not also the earlier words "the cost of the repairs and "insurance" (post, pp. 234, 239, 240).

Per Willmer and Harman L.JJ. *Semble,* the word "state" in subsection (3) (*a*) does not include state of repair, having regard to the use of the word "state" in subsection (3) (*b*), which in its context of "state of the locality" cannot cover state of repair (post, pp. 238, 240).

(2) That in refusing to admit this particular evidence the tribunal had not exercised its discretion unjudicially, since the evidence could have been given at the hearing; nor did the form of refusal import a general refusal by the tribunal ever to admit further evidence after a hearing had been concluded and before a decision was given (post, p. 237).

Decision of Lands Tribunal affirmed.

APPEAL from the Lands Tribunal.

The facts relevant to the appeal, as stated in the Lands Tribunal decision and the case stated, which, together with a schedule relating to comparable flats, formed the case stated, were as follows:

A tenant, Wexler, appealed from a decision of the South-West London Local Valuation Court determining an assessment of £69 gross value, £51 rateable value on a flat, second floor, 13, Park Mansions, Prince of Wales Drive, Battersea.

The flat in question was in a substantial block of flats erected some 60 years ago. It was on the second floor and contained lounge, three bedrooms, kitchen, dining-room, bathroom and separate w.c., the lounge and one bedroom overlooking Battersea Park.

In a return dated October 22, 1934, the flat was shown let at a yearly rent of £110, the landlord being responsible for rates, repairs, insurance and services. It was agreed before the Lands Tribunal that the premises were vacant between March, 1935 and 1944. In a return dated October 7, 1957, the flat was shown as being vacant in June, 1939, but occupied in October, 1957, at a rent of £135 0s. 3d., the tenancy commencing on October 24, 1948, the landlord being responsible for rates, services, insurance and external repairs, while the tenant was responsible for internal repairs.

Before the Lands Tribunal the tenant's main contention was that on the evidence before the tribunal Battersea Park had been the main amenity of the flat; that the coming of the Fun Fair in 1951 had seriously affected the peaceful enjoyment of the Park; and that the amenities of the flat were further affected by a rubbish dump in the Park opposite, which had not been there in 1939.

Regarding the flat itself, evidence given for the tenant was that the water system was such that in 1957 a sanitary notice had been served in respect of "wet, defective and perished condition "of walls and ceiling in kitchen; leaky condition of water tank," and that during 1956 and 1957 there was considerable inconsistency in the electricity supply. A schedule of condition put in for the tenant and compiled after an inspection of the flat on October 8, 1957, showed that the flat was in poor decorative repair; there were sundry cracks in the ceilings and in some of the walls; the window frames required re-setting due to war damage; there were patches of dampness in the kitchen ceiling, presumably due to leakage from the flat above, and there was dampness in the kitchen wall; the hot water tank was defective, and the stove apparently out of order. It was agreed that all these defects were reparable. In making his valuation the expert witness for the tenant started from the 1934 rent of £110 which he considered fair. He reduced that by £5 to allow for a general reduction in values between 1935 and 1939, and then made a further reduction of £27 for the state of the hereditament and loss of amenities as between 1939 and 1957 and so arrived at a figure of £73 for gross value plus rates.

For the tenant it was submitted, first, that, in the light of section 2 (3) (*a*) of the Valuation for Rating Act, 1953,[1] when arriving at gross value the actual state of repair at the date of valuation must be taken into account, and reliance was placed on the definition of "gross value" in section 2 of that Act. Secondly, it was submitted that on the authority of *Robinson Brothers (Brewers) Ltd.* v. *Houghton and Chester-le-Street Assessment Committee* [2] the only evidence admissible was that of the rent actually being paid for the flat in 1934; and thirdly, that the changes since 1939—the building being 18 years older, the advent of the Fun Fair with the increase in the traffic, noise, smells and general adverse effect on the enjoyment of the Park for residents, the inconsistency of the electric supply, and the presence of the rubbish heap in the Park—depreciated the value of the flat.

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[1] For footnote see p. 217.

[2] [1937] 2 K.B. 445; [1937] 2 All E.R. 298.

The valuation officer maintained that in estimating the gross value he was entitled to look not only at the rent of the flat in question but also at the rent of other flats, and he put in evidence schedules giving details of the rents passing in 1939 for all the flats in Park Mansions. In his view the Fun Fair had not depreciated the value of the flats, and against any possible lessening of amenity he considered that there should be offset the additional value arising from increasing travelling difficulties tending to add to the value of residences within easy reach of the centre of London and the advantage of overlooking an open space when open spaces were steadily decreasing in the London area.

The valuation officer agreed that with regard to the flat itself, decorating was needed; the hot water tank required replacing; there were defects in the window frames, and there were superficial cracks in the ceilings and walls; but he considered that all these matters were not beyond the landlord to repair; and he relied on the decision of the Lands Tribunal in *Critchlow* v. *Almond* (LVC/173/1957). His valuation produced a gross value of £77.

For the Battersea Borough Council, the rating authority, evidence was given that in arriving at their valuation of £75 gross value, particular regard had been paid to the rents of all the second floor flats in Park Mansions. The rent of any particular flat was checked by looking at other rents of similar properties, if possible, to see whether the particular rent was fair. Guidance from 1938–39 rents was preferred to those of 1934, and the flat in question had been valued as being in a reasonable state of repair. It was considered by the rating authority that the Fun Fair and the Festival Gardens had not affected the rent.

The Lands Tribunal (Mr. H. P. Hobbs) heard the tenant's appeal on October 29 and 30, 1958. On November 10, the tenant applied for a stay of proceedings to enable him to consider with counsel the making of an application for the admission of further evidence; and on December 8 formal application was made by the tenant for the hearing of further evidence arising out of the evidence given on the last day of the hearing by the expert witness for the rating authority, the nature of the evidence being stated as concerning the comparative amounts of natural light reaching Flat No. 18 and Flat No. 13 (the flat in question) and the effect of this on comparability and on the value of No. 13. A further application for the hearing of additional evidence was made by the tenant on December 12, 1958, the date on which the Lands Tribunal gave its written decision. That decision summarised the issues between the parties as follows: First, the ascertainment of the 1939 rent; secondly, whether or not a reduction should be made therefrom by reason of the actual condition of the hereditament at the date of the proposal (which was agreed to be March 30, 1957); and thirdly, whether there should be a reduction for a change of amenities under section 2 (3) (*b*) of the Act of 1953.

The decision cited Scott L.J. in *Robinson Brothers (Brewers) Ltd.* v. *Houghton and Chester-le-Street Assessment Committee*[3] that " Where the particular hereditament is let at what is plainly " a rack rent or where similar hereditaments in similar economic " sites are so let, so that they are truly comparable, that evidence " is the best evidence, and for that reason is alone admissible; " indirect evidence is excluded not because it is not logically " relevant to the economic inquiry, but because it is not the best " evidence," but the tribunal stated that those words could not be construed as meaning that when a hereditament was let, any inquiry must be restricted to that rent alone. Before any valuer could say that a rent was " plainly a rack rent " it was his bounden duty to examine it and check it by reference to other rents if possible. On the facts of the present case it was sufficient to look at the 1934 rent of the flat in question and the rents of other second floor flats, and having done so, the tribunal agreed with the figure put forward by the expert witness for the rating authority, namely, £75.

The tribunal was unable to agree to the submission for the tenant that under section 2 (3) (*a*) of the Act of 1953 the flat must be valued exactly as it existed at the date of the proposal, and that if a hereditament was out of repair at the particular date the rent should be the rent of the premises out of repair and conversely, if in repair, the rent should be that of the premises in repair. The reasons for rejecting that submission were: (1) that it was contrary to what happened in everyday life, for in practice a tenant viewing a house or flat with the decorations dirty and worn, some cracks in the walls and ceilings, and generally in a poor state of repair, so long as his tenancy provided that the landlord was to bear the cost of repairs, would require the landlord not only to keep the premises in a good state of repair

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[3] [1937] 2 K.B. 445, 468–469.

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but also to put the premises in a good and reasonable state of repair and decoration before he entered into possession; and that this was not a matter where the hypotheses of rating required departure from everyday practice. (2) The proposition, if accepted, would create an intolerable situation, for any examination of rental evidence would entail a parallel and detailed examination of the condition of property, decorative and otherwise, as at the date when the tenancy commenced. The present case gave some illustration of the difficulties which could occur, for no witness had been able to produce any reliable detailed evidence concerning the condition of the flat in 1934, the date of the commencement of the rent on which the ratepayer relied. The tribunal agreed with the principles applied by the Lands Tribunal in *Critchlow* v. *Almond* (LVC/173/1957) and *Fowler* v. *Lloyd* (LVC/1401/1957) as follows:

"The definition of gross value postulates a rent whereby the "landlord is responsible for all repairs and maintenance and "whatever the actual conditions may be in fact, I consider that "I have to assume that the landlord has carried out his responsi-"bilities and that the premises are in a reasonable state of repair; "unless there are some structural defects which it would be "unreasonable or impossible for the landlord to repair": *Critchlow* v. *Almond*.

"This tribunal has decided in many cases that so far as "decorative condition is concerned, a landlord is assumed to "honour his hypothetical obligations to an extent which could "reasonably be expected having regard to the fundamental "structural condition of the property. That, however, does not "involve the assumption that new decorations are constantly "kept in first-class order, which the decorations in their condition "at the date of a proposal would justify in the open market. . . . "The rent of such a newly decorated house would not be fixed "rebus sic stantibus, but would be related to a compromise "between its newly decorated condition and its condition some "years later. If, however, the decorations have reached a stage "where 'no reasonable man would take the house' or, more "practically, no reasonable occupier would continue to tolerate "them, the above assumptions do not apply and the rent should "take the existing deplorable state of the decorations into "account": *Fowler* v. *Lloyd*.

The tribunal did not consider that those citations violated the established doctrine of rebus sic stantibus, for its application to a house meant that the assessment must be the value as a dwelling-house unless without any structural alterations it could be used for some alternative purpose for which there was a demand. The tribunal could not in any event give effect to the tenant's proposition in the present case since there was no evidence before it as to the condition of Flat 13 in 1934.

On the changes in the amenities, and in particular the advent of the Fun Fair, the tribunal decided that an allowance ought to be made for the loss of amenity due to that advent. Having found that the gross value plus rates of the flat in 1939 should be £115, which with the statutable deductions and rates then in force gave a gross value of £75 under 1939 conditions, the tribunal reduced the gross value to £65 with a corresponding rateable value of £48.

On the applications to hear further evidence the tribunal decided that they should be refused on the ground that once a hearing had been concluded that part of the proceedings was definitely finished; and the fact that a decision was often reserved to enable the tribunal to comply with the requirement that the decision should be given in writing, together with a brief statement of the reasons for the decision, should not afford an opportunity for any of the parties concerned to adduce fresh evidence.

In a case stated on March 23, 1959, which together with the decision set out above (so far as relevant to the appeal to the Court of Appeal) formed the case stated for the decision of the court, the following further facts were proved or admitted: (a) That the date of the proposal by the ratepayer was March 30, 1957; (b) the valuation officer and the rating authority admitted that if it was correct in law to value the hereditament in the state of repair in which it was at the date of the proposal a deduction from the inclusive rental of £120 per annum for the state should be made in the valuations submitted on behalf of the valuation officer and the rating authority of £5 and £10 respectively; and (c) that the fall in the inclusive rental value of the hereditament as between 1934 and 1939 was properly represented by a fall of £5.

The tenant appealed; and the question for the court was whether on the findings of fact the Lands Tribunal came to a correct decision in law.

W. J. Glover for the tenant. First, section 2 of the Act of 1953 on its proper construction requires that for valuation purposes one has to start with the actual state of the hereditament at the time of valuation and make the assumption, in accordance with subsection (3) (*a*), that it was in the same state on June 30, 1939. "State" in that context includes state of repair and decoration, because the state of repair affects the hypothetical rent which a tenant would pay, and that rent is the basis of rateable value under subsection (2). It is conceded that a state of repair, if purely temporary, cannot affect rating, but if it affects the letting value of the hereditament, then in law it is relevant to rating, for the hypothetical landlord's covenant in section 2 (2) is only to "maintain the hereditament in a state to command "that rent"; thus on the words of the subsection the landlord does not have to put the premises into good repair before the tenant goes in. A tenant might put things right himself, but the rent he would then bargain to pay would be on the basis of the state of disrepair, and conversely, if the premises were in or were put into good repair, the hypothetical rent would be correspondingly higher and the rateable value also higher. The statute works both ways.

[WILLMER L.J. So if a fortuitous casualty rendered the premises temporarily uninhabitable, there would be no rent possible and no rate payable?]

That would be so.

[HARMAN L.J. And a ratepayer could steal a march on his fellow ratepayers by having the property in a bad state of repair at the time of valuation?]

He could get that advantage until the premises were put into a good state of repair.

[MORRIS L.J. Does not the word "reasonably" in subsection (2) import the idea that the hypothetical landlord and tenant will behave in the way they are likely to do in ordinary life?]

The statutory covenant assumes only that the landlord will act in accordance with his legal obligations, and his only legal obligation is to keep the premises in a state to command "that "rent." As there would be a lower rent for premises in disrepair, the bargain between landlord and tenant would be just as "reasonable" as that which the Lands Tribunal has imported, under which the landlord puts the premises into repair before the tenant goes in. The tribunal has not construed section 2; it has merely put a convenient gloss on it for practical rating purposes. But an Act of Parliament cannot be construed by considering the difficulties which the proper construction would create.

The definition of "gross value" in section 2 of this Act is virtually the same as that in section 68 of the Rating and Valuation Act, 1925, and the statutory test stated by Scott L.J., considering that definition in *Robinson Brothers (Brewers) Ltd.* v. *Houghton and Chester-le-Street Assessment Committee*,[4] that "the hereditament to be valued . . . is always the actual house ". . . and that hereditament is to be valued as it in fact is— "rebus sic stantibus," is relied on here. [*Barratt* v. *Gravesend Assessment Committee* [5] was also referred to.]

Construing subsection (2), the concluding words "necessary "to maintain the hereditament in a state to command that rent" govern all the preceding words in the landlord's covenant, including the words "the cost of the repairs and insurance." "Insurance" is relevant because the amount of insurance reflects the capital value of the premises. The use of the word "the" in the phrase "cost of the repairs" supports that construction.

"State" in subsection (3) (*a*) includes state of repair. Any circumstance, including state of repair and decoration, which affects the property at the critical moment of valuation, is included in the word "state" in that paragraph, except outside circumstances, which are dealt with separately in paragraph (*b*) of the same subsection. "State" in paragraph (*b*) is used in its normal sense to cover a number of factors; thus the same word has slightly different meanings which are made clear by the context in the two paragraphs of the same subsection.

The tribunal has erred in not starting from the actual state of the premises and has disregarded the provisions of the section.

Secondly, the Lands Tribunal has either failed to exercise its discretion or has exercised it unjudicially by refusing to admit the further evidence, the nature of which was made known to it. A party can ask for fresh evidence to be admitted at any moment until the drawing up of the tribunal's order when the tribunal becomes functus officio. That point had not arrived when the decision was given, and certainly had not arrived when the first application was made. Under the Lands Tribunal Act, 1949, s. 1, and the Lands Tribunal Rules, 1956 (S.I. 1956, No. 1734), r. 31, the tribunal is given a discretion to hear further evidence in the circumstances of this case: see also rules 34 and 45 (1). In *Clack* v. *Arthur's Engineering Co.*[6] this court said that the judge had failed to exercise his discretion judicially in non-suiting a party without hearing counsel. So here the tribunal should not have exercised its discretion without hearing counsel. Further, the tribunal was wrong to lay down a general rule that in no circumstances will it allow evidence after a hearing has been concluded and before the written decision is delivered: compare *Bigsby* v. *Dickinson* [7] as to allowing fresh evidence at a very late stage. [*Evans* v. *Bartlam* [8] was also referred to.]

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[4] [1937] 2 K.B. 445, 468.

[5] [1941] 2 K.B. 107; 57 T.L.R. 590; [1941] 2 All E.R. 308.

[6] [1959] 2 Q.B. 211; [1959] 2 W.L.R. 916; [1959] 2 All E.R. 503.

J. Raymond Phillips for the valuation officer. The Act of 1953 did not lay down any new method of valuation but merely substituted the date of June 30, 1939, as the effective date for valuation. The form of words as to the landlord's covenant occurs in identical form in the definition of "gross value" in section 68 of the Rating and Valuation Act, 1925, and similar words appear in the Valuation (Metropolis) Act, 1869, and in the definition of "net "annual value" in the Parochial Assessments Act, 1836. In view of the long history of those words, which have never been judicially construed, the question in issue affects the valuation of hereditaments of every class; and if the tenant's construction is right, it will destroy the entire rating practice adopted for over 100 years and make the whole system of valuation unworkable.

What valuers have to do under the Act of 1953—and what experienced valuers in fact do—is to take the actual physical condition at the time of valuation and imagine it as if it existed in 1939. In a particular case the valuer starts a valuation from the rent of the actual premises, if there was a rent; and if not, he starts from the rents of similar premises, which rents spring from leases containing repairing covenants of one kind or another. Unless the valuer can assume that the hereditament was for the purposes of his valuation in a reasonable state of repair, or that the landlord would put it into such a state, it would be impossible for him to make use of the rents of which he has knowledge, for the information as to the state of repair would not be available.

The correct approach on the hypothetical covenants is that adopted by the tribunal, namely, to envisage the bargain that takes place between landlord and tenant when a rent is being fixed. Section 2 (2) deals with two matters of value: (1) the amount of rent, and (2) the repairs which the landlord is undertaking to do. Though the landlord and tenant in coming to terms would look at the house in its actual state of disrepair, it must be assumed that they conclude their bargain on the sensible and usual basis that the landlord will do the reasonable repairs, having regard to the class of property and the neighbourhood, and that the tenant will pay a rent commensurate with the kind of repairs which it is to be assumed the landlord will do. That is how the tribunal, in valuing any kind of hereditament, has approached this section and its predecessors in all the Acts, and if it were not the right way the whole rating system would break down.

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[7] (1876) 4 Ch.D. 24.

[8] [1937] A.C. 473; 53 T.L.R. 689; [1937] 2 All E.R. 646.

There is no authority on the construction of subsection (2) on the point whether all the words preceding "necessary . . . that "rent" are governed by those concluding words, though as a matter of practice valuation officers have always treated them as though the last words governed "the repairs and insurance" as well as "the other expenses," and decisions of the Lands Tribunal show how that is applied in practice. That practice has been to distinguish degrees of disrepair by saying that if it is so great that one cannot imagine the hypothetical landlord putting it into repair, that is a matter to be taken into account. In *Critchlow* v. *Almond* (LVC/173/1957) the tribunal went further and said that "I have to assume that the landlord has carried "out his responsibilities and that the premises are in a reason-"able state of repair, unless there are some structural defects "which it would be unreasonable or impossible for the landlord "to repair."

In *Appenrodt* v. *Central Middlesex Assessment Committee* [9] it was held that the words "other expenses" in section 68 of the previous Act of 1925 were not to be construed ejusdem generis with "the repairs"; but that does not assist much here.

Construing section 2 (3) (*a*), "state" means only structural state and does not include "state of repair." That is made clear by the use of the same word "state" in paragraph (*b*) of the same subsection in relation to "locality," for there it clearly cannot include "state of repair." The word "state" in paragraph (*a*) does not require any particular emphasis.

If the tenant's submissions on construction are right, an inquiry would be necessary in every case as to the state of the premises at the beginning of the tenancy when the known rent was fixed. In the present case that would be the year 1934, and there is no evidence. That illustrates the unworkable nature of the construction contended for. Other difficulties would flow from that construction in relation to the provisions of section 42 of the Local Government Act, 1948, for the curious result would be produced that, if a house was painted, the alteration of the valuation list as a result of redecoration would be retrospective to the beginning of the rating period, whereas if there were a substantial structural alteration, the alteration in the list would only take effect from the date of the structural alteration. That would put an end to uniformity in rating.

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[9] [1937] 2 K.B. 48, 54, 61; [1937] 2 All E.R. 325.

Phillips was not required to argue on the exercise of the tribunal's discretion in refusing to admit further evidence.

J. P. Harris for the rating authority. The submissions for the valuation officer are adopted. Construing subsection (2), a line should be drawn after "insurance," effect should be given to the comma, and the concluding words should be read as relating only to "the other expenses." That is a possible construction if the relevant words in the Act of 1953 are compared with those in the Parochial Assessments Act, 1836, where there were commas after "repairs" and "insurance."

Construing subsection (3) (*a*), the tenant can only succeed if "state" includes state of repair. It is submitted that it applies only to structural state, and that the dictum of rebus sic stantibus does not apply to such small items as decorative condition.

Finally, the very practical way in which the tribunal decided this case is important. This particular section of the Act has not been construed in any detail either by the Lands Tribunal or by the Court of Appeal. If the tenant's construction is held to be correct it would affect 15½ million hereditaments and would entail enormous inquiries into the actual decorative and repair state of each. The more practical and elastic approach of the tribunal is more useful for rating purposes than would be a decision against the tenant on the point of construction of section 2.

Glover in reply. The practical difficulties of construing section 2 correctly would not extend to millions of hereditaments, for the definition of "dwelling-house" in section 3 (1) of the Act of 1953 shows that the Act is concerned only with a very limited number of types of property. Nor would the contradictions envisaged by the valuation officer arise under section 42 of the Local Government Act, 1948, for redecoration would be treated in the same way as structural alteration under that section.

This is a statute under which a tax is imposed on citizens, and the court should not be assiduous to find ways of making it easier to collect rates. The whole question turns on the correct

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construction of section 2. It is conceded that the wording of the Act of 1836 would be more favourable to the construction contended for by the tenant, and that those words were altered in the Act of 1869 and appear in altered form in the Act of 1953. "The "other expenses" are related to "the repairs and insurance" and all are governed by the concluding words of the covenant.

MORRIS L.J. This matter concerns the rating of a flat on the second floor of a block of flats called Park Mansions in Prince of Wales Drive, Battersea. The matter went to the Local Valuation Court who gave their decision on October 9, 1957. Thereafter the tenant, who is the appellant in this court, gave a notice of appeal to the Lands Tribunal on October 28, 1957. The Lands Tribunal heard the appeal and gave their decision on December 12, 1958. Thereafter by a notice dated January 21, 1959, the tenant gave a notice requiring the Lands Tribunal to state a case. Accordingly points of law are now raised for our consideration.

[His Lordship stated the relevant facts as set out in the case, and continued:] The rateable value has to be arrived at by following the provisions of the Valuation for Rating Act, 1953. [His Lordship read section 2 (1), (2) and (3) (*a*) and continued:] It is agreed that for present purposes the time of valuation was March 30, 1957. Subsection (3) (*b*) reads: "that the locality in "which the hereditament is situated was on and about the said "day in the same state, as respects the other premises situated "in that locality and (subject to the next following subsection) as "respects . . . the transport services and other facilities available "to persons living or working in the locality, and as respects "other matters affecting the amenities of the locality, as it is at "the time of valuation," which again, as I have said, means in this case March 30, 1957.

Questions arose as to the way in which to value having regard to the provisions of those subsections (2) and (3). Under subsection (3) a point was taken by the tenant that there now exists in the Park near his flat a Fun Fair which is open in the summer months and which attracts a number of people to the locality. It was contended by him that if the conditions now obtaining were related to June, 1939, the effect should be to diminish the gross and rateable values. The valuation officer was of the opinion that the gross value should be £77 with a rateable value of £58. When the matter went to the Local Valuation Court the determination there was that the gross value should be £69 and the rateable value £51. On appeal to the Lands Tribunal the decision was that the gross value should be reduced to £65 and the rateable value to £48. A reduction was made by the Lands Tribunal because the view was taken that there were considerations arising out of the coming of the Fun Fair to Battersea Park which would diminish the amenity of the flat and should result in a reduction. Accordingly, the Lands Tribunal so decided, and having so decided, awarded costs of a stated amount to the appellant to be paid by each one of the two respondents, namely, the valuation officer and the Metropolitan Borough of Battersea. We are not concerned with that issue and no point of law arises.

The decision of the tribunal shows that evidence was given as to the state of the premises, the particular flat, in the month of October, 1957. It is recited that a witness, Mr. Arscott, giving evidence for the tenant, put in a schedule of condition which had been compiled after an inspection of the flat made on October 8, 1957, and which showed that the flat was in poor decorative repair. He said that there were sundry cracks in the ceilings and in some of the walls, that the window frames required re-setting due to war damage, that there were patches of dampness in the kitchen ceiling, presumably due to leakage from the flat above, and that there was dampness in the kitchen wall, the hot water tank being defective and the stove apparently out of order. That witness, Mr. Arscott, agreed that all those defects were reparable. The decision also recites that the tenant himself gave evidence that in 1957 the water system was such that a sanitary notice had been served in respect of " wet, defective and perished condition " of walls and ceiling in kitchen; leaky condition of water tank," and he had said that in 1956 and 1957 there was considerable inconsistency in the electricity supply. The decision further records that the valuation officer had agreed that with regard to the flat itself decorating was needed, that the hot water tank required replacing, that there were defects in the window frames and that there were superficial cracks in the ceilings and walls; but he considered that all those matters permitted of repair by the landlord. The decision of the Lands Tribunal, I think, proceeded on the basis that on March 30, 1957, that is to say, the time of valuation, there were conditions of disrepair in the premises of the nature of those to which I have referred.

The Lands Tribunal arrived at their conclusion by looking at the 1934 rent of the flat and by looking at the rents of other second floor flats. The tribunal came to the conclusion, having

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done so, that the starting figure should be £120. There was no doubt that certain adjustments then had to be made concerning services and interior repairs, and, those adjustments having been made, the figure would become one of £115 inclusive of rates. That was the decision of the Lands Tribunal. If the deduction for rates was made, then the gross figure would be £75. As I have indicated, the Lands Tribunal reduced that £75 to £65 because of the view taken concerning the change in amenities arising out of the coming of the Battersea Fun Fair. The Lands Tribunal, therefore, fixed £65 as the gross value and £48 as the rateable value.

There are now two main points of law which have been argued by Mr. Glover for the tenant and which were points that were taken, so far as they could be taken, before the Lands Tribunal. The notice of appeal summarises the points under four heads, but the third of the four has not been argued before us. The first and second, which Mr. Glover agrees can really be taken as one main point, read as follows: "(1) That section 2 of the Valuation "for Rating Act, 1953, requires the hereditament to be valued "in the state of repair in which it was at the time of valuation. "(2) That the landlord's covenant under section 2 is only to "maintain the hereditament in the state of repair in which it was "at the time of valuation." Mr. Glover's argument runs as follows. He says that if reference is made to section 2 (3) (*a*), there has to be the assumption that on June 30, 1939, or on or about that date, the hereditament was subsisting in the state in which it actually subsists at the time of valuation. The time of valuation was March 30, 1957; and Mr. Glover says that the evidence was sufficient to establish that there were certain defects in the premises, of the kind to which I have referred, and that they existed on or about March 30, 1957. He therefore says that the valuation under section 2 (2) must be made on the assumption that in June, 1939, the hereditament was subsisting in the state in which it actually subsisted on or about March 30, 1957. He then says that in its application to the facts of this case subsection (2) contemplates an arrangement being made between a hypothetical landlord and a hypothetical tenant on the basis of the premises being in a state of disrepair, the landlord merely agreeing to do such repairs as would be necessary to prevent the premises becoming any worse.

To that submission counsel for the two respondents make several replies. They submit that that is a wholly unreal and artificial approach. They further submit certain contentions in regard to the construction of the words of subsection (2) and subsection (3). In regard to the words in subsection (3) (*a*), " that " the hereditament was subsisting on and about the said thirtieth " day of June in the state in which it actually subsists at the " time of valuation," it is submitted, particularly by Mr. Harris, that the word " state " as there used refers to the structural condition of the premises but does not include the state of repair or state of decoration. In furtherance of his submission he referred to a point, first raised by Harman L.J., that the word " state " is also used in sub-paragraph (*b*) of subsection (3) in the phrase " that the locality in which the hereditament is situated " was on and about the said day in the same state, as respects " the other premises situated in that locality," and so on. It was submitted that the basis of Mr. Glover's argument fails, because " state " does not include state of repair. Mr. Glover says that he does not contend that " state " primarily means state of repair but that the word is wide enough to include state of repair.

I do not think that it is necessary to express a final opinion on this point, for I propose to reach my conclusion on the assumption that the words of subsection (3) (*a*) are sufficiently wide to include the state of repair or decoration of the premises.

Another point of construction that has been raised concerns the words at the end of subsection (2): " if the landlord had under- " taken to bear the cost of the repairs and insurance, and the " other expenses, if any, necessary to maintain the hereditament " in a state to command that rent." Are we to read the concluding words as governing " cost of the repairs and insurance " or are we to read them as governing " the other expenses, if " any, necessary to maintain the hereditament in a state to " command that rent " ? The words used in the subsection have substantially been in existence for a very long time. They are substantially the words which form the definition of " gross " value " in section 68 of the Rating and Valuation Act, 1925: " ' Gross value ' means the rent at which a hereditament might " reasonably be expected to let from year to year if the tenant " undertook to pay all usual tenant's rates and taxes . . . and if the " landlord undertook to bear the cost of the repairs and insurance, " and the other expenses, if any, necessary to maintain the " hereditament in a state to command that rent." So in the Act that applied to the metropolis, the Valuation (Metropolis) Act, 1869, in section 4 we find a definition of " gross value " which is substantially in the same terms. If, however, we go back to the Parochial Assessments Act of 1836 we find these words:

"the rent at which the same might reasonably be expected "to let from year to year, free of all usual tenants' rates "and taxes, and tithe commutation rentcharge, if any, and "deducting therefrom the probable average annual cost of the "repairs, insurance, and other expenses, if any, necessary to "maintain them in a state to command such rent." Those words and that punctuation would more accord with the construction for which Mr. Glover contends; and it has been pointed out that in the change after the Act of 1836 there was no comma between the word "repairs" and the word "insurance" but instead of a comma the word "and" was inserted. That seems to lend some support to the view that the concluding words of subsection (2) are words that relate to "the other expenses, if any, necessary "to maintain the hereditament in a state to command that rent." The words of the subsection refer to the cost of the repairs and insurance. The cost of insurance would not seem normally to be effectively described by the words "expenses . . . necessary to "maintain the hereditament in a state to command that rent."

This point of construction does not appear ever to have been decided, but Mr. Raymond Phillips very frankly told us that his instructions were that in practice valuers had rather proceeded on the assumption that the concluding words did govern all the words that went before. Again, for my part, I do not find it necessary to decide this point, for it seems to me that even on the basis for which Mr. Glover contended, he still does not succeed. Mr. Glover's contention was summarised in the decision in this way: "Mr. Glover argued that under section 2 (3) (*a*) of "the Act of 1953 the flat must be valued exactly as it existed at "the date of the proposal, submitting that if a hereditament was "out of repair at the particular date, then the rent should be the "rent of the premises out of repair and, conversely, if in repair, "then the rent should be that of the premises in repair." The Lands Tribunal did not accede to those submissions. The first reason stated by the Lands Tribunal for disagreeing was expressed as follows: "I think that it is contrary to what happens "in everyday life, for in practice I am sure that a tenant viewing "a house or flat with the decorations dirty and worn, some cracks "in the walls and ceilings, and generally in a poor state of repair, "so long as his tenancy provided that the landlord was to bear "the cost of repairs, would not only require the landlord to keep "the premises in a good state of repair but also to put the "premises in a good and reasonable state of repair and decoration "before he entered into possession, and I do not think that this is

" a matter where the hypotheses of rating require departure from " everyday practice." It seems to me that there is no error of law in that approach.

If, therefore, I make the assumption for which Mr. Glover contends, namely, that on or about June 30, 1939, the flat was in the state in which it actually was on March 30, 1957, and if I assume in his favour that the word " state " is wide enough to cover state of repair and state of decoration, it seems to me that Mr. Glover's submission becomes really a most unrealistic one. He submits that what has to be ascertained if premises are in temporary disrepair is what rent would be paid on the basis that the landlord only undertook to do such repairs as would prevent the premises from becoming in a worse state of disrepair. I cannot think that that is right. It runs contrary, as it seems to me, to all reason and does not accord with what could reasonably be contemplated as likely to be the bargain between a landlord and tenant. I think we must bear in mind the opening words of subsection (2): " The said rent is that at which the hereditament " in question might reasonably have been expected . . . to let." There is, therefore, introduced what might be expected and what might reasonably be expected. When the words of this subsection are first read it might seem as though a somewhat illusory test is laid down for the fixing of the rent. If a high rent was fixed, that could command onerous repair obligations and if a very low rent were fixed, that might result from a refusal to undertake any substantial repairs. That rather illusory test will not apply if the construction of subsection (2) is the construction contended for, particularly by Mr. Harris. But it seems to me that the section is contemplating that the landlord will do repairs, and it must be remembered that if a landlord is to maintain premises in repair or to keep premises in repair, he has the obligation to put premises in repair. So it seems to me, if one postulates that a hypothetical landlord and a hypothetical tenant went into a flat which had the defects to which I have referred, such as bad window frames, cracks in the walls and ceilings and dampness and so on, and if we are considering what might reasonably have been expected by way of rent, I would say that it would be such rent as would be payable on the basis that the landlord would then do the necessary repairs to make the flat reasonably habitable and would do such later repairs as would be reasonable in all the circumstances. I think one must assume that ordinary sensible people are dealing with the situation. I think also that consideration must be given to the class of property with which they are dealing.

Mr. Glover points out that in the case it is stated as follows: "It was admitted by both respondents that if it was correct in "law to value the said hereditament in the state of repair that "it was in at the date of the said proposal a deduction for the "state should be made in the valuations submitted on behalf of "the respondents. On behalf of the respondents the Battersea "Borough Council it was admitted that the said deduction should "be the sum of £10 per annum from the inclusive rental of £120 "per annum. It was admitted by the respondent Playle that "the said deduction from his inclusive rental should be £5 per "annum." There is a difference, it will be seen, between those two figures. But for the reasons that I have given, it seems to me that the Lands Tribunal did not in any way err in law in their approach. The state of disrepair was something that was easily remediable, as the case finds. In those circumstances it seems to me that what would reasonably be expected would be that the tenant would require the landlord to put right those remediable defects. Accordingly I consider that the basis on which the Lands Tribunal proceeded is not shown to be erroneous in law.

The other remaining point, which is quite a separate point, arises in this way. The hearing before the Lands Tribunal was on October 29 and 30. During the hearing, for the purpose of arriving at the starting figure of rent for the flat in question, a schedule or list of tenancies was put in showing the rents of second floor flats in the block of flats as at June, 1939. A flat which compared in size with No. 13 was No. 18, and the figures and circumstances with regard to that flat were set out, being part of the evidence for the tribunal to consider. After the hearing was concluded the tribunal decided to reserve its decision so as to put the decision into writing. On November 10 an application was made by the tenant for what was called a stay of proceedings to enable him to consider with counsel the making of an application for admission of further evidence. The other parties did not demur to the suggestion, and on December 8 a formal application was made by the tenant for the hearing of further evidence arising out of the evidence given on the last day of the hearing by the expert witness for the Battersea Borough Council. The decision recites that "the evidence was to concern "the comparative amounts of natural light reaching Nos. 18 "and 13, Park Mansions, and the effect of this on comparability "and on the value of No. 13." It will be apparent, therefore, that the nature of the additional evidence was such that the evidence could have been given at the time of the hearing. The case recites that the Lands Tribunal decided to refuse the application. I read from the decision: "I decided that these "applications should be refused because I am strongly of opinion "that once a hearing has been concluded that part of the proceed"ings is definitely finished and the fact that a decision thereon "is often reserved to enable the tribunal to comply with the "requirement that the decision shall be given in writing, together "with a brief statement of the tribunal's reasons for its decision, "should not afford an opportunity for any of the parties concerned "to adduce fresh evidence." In the case stated the tribunal say: "I refused this application and read my decision, a signed "copy of which, together with a document setting out the details "of the second floor flats, is annexed hereto and forms part of "this case."

Mr. Glover submits that the Lands Tribunal had power to admit the further evidence sought to be tendered but wrongfully refused to exercise such power. He submitted that there was power to admit the evidence and a discretion in the tribunal, but that the tribunal either failed to exercise the discretion judicially or failed to exercise it at all. We were referred to the Lands Tribunal Rules, 1956 [S.I. 1956, No. 1734]. I do not propose to mention them in detail. It does not seem to me that there is any substance in this complaint. The Lands Tribunal do not say that in no circumstances ever would they hear further evidence after the evidence had been concluded. There are many circumstances in which a court might feel it appropriate to accede to an application to hear further evidence before judgment was given in a case where the hearing had been concluded and judgment reserved. This is not the occasion to seek to describe the situations where that might be appropriate. We were referred to *Bigsby* v. *Dickinson*.[1] That was a situation in which the Court of Appeal thought that it was clearly right that an opportunity should have been given to hear further evidence. It might easily be that after the conclusion of the evidence in a case and while judgment was reserved it might be found that there had been some inadvertent error in a figure or in some evidence and that it would be proper to make an application to a judge to hear further evidence in order to correct an error, and a judge would be very likely in an appropriate case to accede to such an application. But the present situation was quite different. A

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[1] (1876) 4 Ch.D. 24.

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comparison between No. 13 and No. 18 was something which was a part of the inquiry before the Lands Tribunal; and if parties, after a hearing is concluded, have some good ideas and feel that they would like to add a little to what they have already put forward, they might well make the end of litigation quite uncertain. It seems to me that the Lands Tribunal had a discretion here over this matter. I do not think that there was any wrongful or non-judicial exercise of this discretion. It was perfectly within their powers to decide as they did. I, therefore, am of the opinion that that submission so clearly made by Mr. Glover also fails. I think, therefore, that the points to be decided in this case must be decided against the appellant.

Willmer L.J. I have come to the same conclusion, and there is but little that I desire to add to what my Lord has said.

The right of appeal from the Lands Tribunal to this court is on a question of law only, and I am not persuaded in this case that the decision of the tribunal discloses any error of law. The principal argument advanced on behalf of the appellant amounts to this, that the combined effect of subsections (2) and (3) (*a*) of section 2 of the Valuation for Rating Act, 1953, is that the gross value of the premises in question is to be fixed by reference to the rent that such premises would have been expected to command at the material date in 1939, if they were in the same state of repair in which they actually were in 1957, and on the assumption that the landlord will do such repairs as are necessary to maintain the premises in a state of repair to command that rent. It seems to me that two assumptions are fundamental to that argument, and for myself I am doubtful as to the validity of either of them. One assumption is that the word "state," where it occurs in subsection (3) (*a*), includes state of repair so as to cover the kind of defective condition of repair that we have in this case. My Lord has already read the defects alleged here and it is unnecessary to repeat them. For myself I think it is extremely doubtful whether the word "state" is to be read in the sense of including state of repair. As my Lord has pointed out, where the same word occurs in the following sub-paragraph (*b*), it clearly has no reference to state of repair, and I am not persuaded, therefore, that the first assumption is correct.

The argument also assumes that the concluding words of subsection (2), namely, the words "necessary to maintain the "hereditament in a state to command that rent," are to be construed as governing not only the words "the other expenses,

" if any," which immediately precede them, but also the earlier words, namely, " the cost of the repairs and insurance." For it is basic to the tenant's argument that the landlord's undertaking is to be construed as an undertaking only to execute such repairs as are necessary to maintain the hereditament in the same state of repair as at the date of the proposal. My Lord has already suggested some difficulties in the way of adopting that construction. I venture to suggest another difficulty. The words actually run: " the cost of the repairs and insurance, and the other " expenses, if any, necessary to maintain the hereditament in a " state to command that rent." On the tenant's argument we should have to construe those words as though they read: " the " cost of the repairs and insurance, and the cost of the other " expenses." That seems to me to be a very strange way of reading the subsection, and I should have thought that the more natural construction to put upon it is that the concluding words, which I have already read, are to be taken as governing only " the other expenses " which immediately precede them. Speaking for myself, therefore, I am disposed to doubt the validity of both the assumptions that underlie the tenant's argument.

However, as my Lord has pointed out, it is not necessary for us in this case to reach any concluded view about that, because the Lands Tribunal has in fact taken another route to the solution of the case, and, as I have already said, I can see no error of law in the reasons given for the decision. Even making those two basic assumptions in favour of the tenant, it remains true to say that the argument involves something which, in the words of the tribunal, is contrary to what happens in everyday life. For my part I should have thought it is clear that subsection (2) is to be construed on the basis of what normally does happen in everyday life. I infer that from the incorporation of the word " reasonably " at the beginning of subsection (2). The subsection speaks of the rent which might " reasonably " have been expected. That imports the notion of a reasonable landlord and a reasonable tenant, behaving reasonably and making a reasonable arrangement. If that is the right approach, then I entirely agree with what my Lord has said, namely, that one would expect a reasonable landlord and a reasonable tenant, when contracting for a tenancy, if it appeared that there were readily remediable defects such as those we have in this case, to proceed on the basis that the landlord's covenant to repair would include an obligation not only to keep the premises in repair but to put the premises in

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repair. That seems to me the common-sense application of the subsection. That is the way in which the tribunal applied the subsection, and I am quite unable to say that the decision was wrong. On that main point, therefore, I do not find myself able to accede to the tenant's argument.

With regard to the second point, namely, that the tribunal was in error in refusing to grant leave to call further evidence after the hearing was concluded, I find myself in agreement with what my Lord has said, and I desire to add nothing further. In those circumstances I agree that this appeal should be dismissed.

HARMAN L.J. I am of the same opinion. It seems to me the decision of the Lands Tribunal was no less good law than it was clearly good sense. It would produce chaos if the tenant's contentions were upheld. It seems to me that where there is a landlord under a repairing covenant and a tenant about to take a house on a year's tenancy, the tenant must naturally be supposed to have a landlord whom he can oblige to observe his repairing covenant, and therefore the fact that there are, at the moment when the bargain is made, reparable and temporary defects in the property ought not to be taken into account in arriving at the hypothetical rent which is the basis of the rateable value. If it were otherwise, it would be difficult in any case, and quite impossible in a case like the present, to arrive at a conclusion dependent on a state of repair existing so long ago as 1939. I am glad to think, therefore, that the tribunal was able to come to what seems to me to be a sensible conclusion and one in accordance with the law without the necessity of deciding the rather nice questions of construction raised by the two subsections which my Lords have discussed. On those I desire to reserve my opinion, expressing as at present advised a preference for the views to which Willmer L.J. has given expression.

I need say no more on the other point than that I agree with Morris L.J.

Appeal dismissed with costs—one set of costs to be divided equally between the two respondents.

Leave to appeal to the House of Lords refused.

Solicitors: *Mortimer, Wexler & Co.; Solicitor, Inland Revenue; Sharpe, Pritchard & Co.*

M. M. H.

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July 3.

Lord Parker C.J., Slade and Winn JJ.

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July 24, 27, 28, 29;
Oct. 13, 26.

Lord Evershed M.R., Romer and Sellers L.JJ.

Habeas Corpus—Protectorate—Jurisdiction—Restriction order requiring native of Northern Rhodesia to remain in certain district of Northern Rhodesia—Restriction order made by Governor of Northern Rhodesia—Whether Northern Rhodesia "foreign dominion" of Crown—Whether foreign territory—Jurisdiction to issue writ to governor—Jurisdiction of court to issue writ overseas—Whether Secretary of State for Colonies a custodian—Whether amenable to issue of writ—Habeas Corpus Act, 1862 (25 *&* 26 *Vict. c.* 20), *s.* 1—*Foreign Jurisdiction Act,* 1890 (53 *&* 54 *Vict. c.* 37).

In June and October, 1957, the Governor of Northern Rhodesia made restriction orders pursuant to powers conferred by the Emergency Powers Regulations, 1956, of Northern Rhodesia, requiring M., a native of Northern Rhodesia, to remain in the district of the Chief Mporokoso. At all material times Northern Rhodesia was a protectorate, and, according to an affidavit by the Secretary of State for the Colonies, was "a foreign country within which Her "Majesty has power and jurisdiction by treaty, grant, usage, "sufferance and other lawful means within the meaning of the "Foreign Jurisdiction Act, 1890, but not recognised by Her "Majesty as, nor is it, part of Her dominions, but She has power "and jurisdiction within the same." M. applied for a writ of habeas corpus directed to the Governor of Northern Rhodesia, the District Commissioner of the Mporokoso District and the Secretary of State for the Colonies, on the ground that he was unlawfully detained in that the Order in Council, under which the Emergency Powers Regulations were made, was invalid, and that, consequently, the restriction orders were invalid. Under the Constitution of and legislation in regard to Northern Rhodesia the Secretary of State had powers which extended beyond mere advice, but his approval or consent to the restriction orders was not required and he took no part in the detention.

On preliminary objections taken by the respondents to the jurisdiction of the court to issue the writ in the circumstances, and on the assumptions (which were not admitted): (a) that M. was a British subject; (b) that, inter alia, the Order in Council was invalid, and (c) that M.'s confinement was of such a nature as to enable him, had he been confined in this country, to apply for the writ, it was held by the Divisional Court (Lord Parker C.J., Slade and Winn JJ.):

(1) That the court had no jurisdiction to issue the writ of habeas corpus to custodians in a protectorate such as Northern Rhodesia in respect of a detention in that protectorate; the court's power to issue the writ was a manifestation of the sovereignty of the Crown, existing by force and virtue of the common law, the concept of which was territorial, so that the court might only issue the writ throughout the Sovereign's dominions in the territorial sense to the extent which common law or statute permitted or

required the Sovereign to issue it, whereas Northern Rhodesia, though under the dominion of the Crown in the sense of subjection, was not a territorial dominion of the Crown, but a foreign country into which the writ could not lawfully issue; no distinction could be made between a foreign territory which was to all intents and purposes wholly under the subjection of Her Majesty and a territory where the subjection was only partial, nor did it make any difference that the custodian in such territory was a servant of the Crown; accordingly, the application against the Governor and the District Commissioner must be dismissed (post, pp. 276, 277).

Dictum of Kennedy L.J. in *Rex* v. *Earl of Crewe, Ex parte Sekgome* [1910] 2 K.B. 576, 624; 26 T.L.R. 439 applied.

Calvin's Case (1609) 7 Co.Rep. 1; *Rex* v. *Cowle* (1759) 2 Burr. 834 and *Ex parte Anderson* (1861) 3 E. & E. 487 considered.

Per curiam: The expression "Foreign dominion of the Crown" in section 1 of the Habeas Corpus Act, 1862,[1] means a territorial dominion of the Sovereign overseas, and not a foreign territory over which the Sovereign exercises dominion in the sense of power (post, p. 271).

(2) That the Secretary of State for the Colonies had not sufficient degree of control to constitute him a custodian of the body to whom the writ would issue; although the writ would issue to a person having constructive custody in the sense of power and control over the body, and there might be special circumstances in which a Secretary of State would be amenable to the writ, there was nothing in the facts of the case which would justify the court calling upon him to produce the body; the fact that he might advise and attempt to persuade Her Majesty to cause the body to be brought up did not amount to such custody as would enable the writ to issue (post, pp. 279, 280).

Barnardo v. *Ford, Gossage's Case* [1892] A.C. 326; 8 T.L.R. 728 distinguished.

Semble: The writ would not issue to a custodian in this country where the original and present detention was in a foreign country merely by reason of the physical presence here of the custodian (post, p. 280).

On appeal:—

Held, allowing the appeal on the first point, that the jurisdiction to issue the writ of habeas corpus of the Court of Queen's Bench was not limited to territories outside England which were strictly called "colonies or foreign dominions," but extended to territories which, having regard to the extent of the dominion in fact exercised, could be said to be "under the subjection of the "Crown," and in which the issue of a writ would be regarded "as "proper and efficient," and that if upon a proper investigation of the facts it appeared that the internal governance of Northern

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[1] Habeas Corpus Act, 1862, s. 1: "No writ of habeas corpus shall issue "out of England, by authority of "any judge or court of justice therein, "into any colony or foreign dominion "of the Crown where Her Majesty "has a lawfully established court or "courts of justice having authority to "grant and issue the said writ, and "to ensure the due execution thereof "throughout such colony or dominion."

Rhodesia was in legal effect indistinguishable from that of a British colony or country acquired by conquest, then, in conformity with the nature of the writ, there was no reason for denying the jurisdiction of the court to issue it (post, pp. 302, 303).

Dicta of Lord Mansfield C.J. in *Rex* v. *Cowle* (1759) 2 Burr. 834, 853, 854 applied.

Ex parte Anderson (1861) 3 E. & E. 487; *Rex* v. *Earl of Crewe, Ex parte Sekgome* [1910] 2 K.B. 576; 26 T.L.R. 439; *In re Ning Yi-Ching* (1939) 56 T.L.R. 3; and *Nyali Ltd.* v. *Attorney-General* [1956] 1 Q.B. 1; [1955] 2 W.L.R. 649; [1955] 1 All E.R. 646 considered.

Decision of the Divisional Court on the first point reversed.

APPLICATION for leave to issue a writ of habeas corpus ad subjiciendum.

The applicant, Andrew Mwenya, a native of Northern Rhodesia, was the subject of two restriction orders made on June 15 and October 5, 1957, by the Governor of Northern Rhodesia under which he was required to remain in the Mporokoso District of Northern Rhodesia. On November 28 and 29, 1956, restriction orders had been made against the applicant under regulation 18 of the Emergency Powers Regulations, 1956, of Northern Rhodesia, and the orders in question of June 15 and October 5, 1957, were made under section 8 and other provisions of the Emergency (Transitional Provisions) Ordinance, 1956, of Northern Rhodesia [No. 38 of 1956] for the making of restriction orders against persons in respect of whom orders had been made under the Emergency Powers Regulations, 1956. The Emergency Powers Regulations, 1956, were made pursuant to powers conferred upon the Governor by the Emergency Powers Order in Council, 1939 (as amended by the Emergency Powers Orders in Council of 1952 and 1956), which Order in Council was made under the powers contained in the Foreign Jurisdiction Act, 1890.[2]

The applicant applied for leave to issue a writ of habeas corpus directed to the Secretary of State for the Colonies, the Governor of Northern Rhodesia and the District Commissioner of the Mporokoso District on the ground that he was unlawfully detained,

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[2] Foreign Jurisdiction Act, 1890: "Whereas by treaty, capitulation, "grant, usage, sufferance, and other "lawful means, Her Majesty the "Queen has jurisdiction within "divers foreign countries, and it is "expedient to consolidate the Acts "relating to the exercise of Her "Majesty's jurisdiction out of Her "Dominions: 1. It is and shall be "lawful for Her Majesty the Queen "to hold, exercise, and enjoy any "jurisdiction which Her Majesty now "has or may at any time hereafter "have within a foreign country in the "same and as ample a manner as if "Her Majesty had acquired that "jurisdiction by the cession or con"quest of territory."

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it being alleged that the Emergency Powers Order in Council, 1939, being made under the Foreign Jurisdiction Act, 1890, was a Statutory Order in Council so far as Northern Rhodesia was concerned to which the Rules Publication Act, 1893, section 1 (1) of which required that a notice of intention to make such an order must be published in the London Gazette at least 40 days before the order was made, applied, and that, as no such notice had been published, the order, in so far as it applied to Northern Rhodesia, was void, and that, on the basis that the parent Order in Council of 1939 was void, so were the Emergency Powers Regulations, 1956, and the Ordinance of 1956 void, and that, accordingly, the restriction orders were also void.

On May 12, 1959, the court adjourned the hearing for notice of the application to be served upon the Secretary of State for the Colonies, the Governor of Northern Rhodesia and the District Commissioner of the Mporokoso District. The following are the material parts of an affidavit sworn by the Secretary of State for the Colonies: "2. The Northern Rhodesia Protectorate is a "foreign country within which Her Majesty has power and juris- "diction by treaty, grant, usage, sufferance and other lawful "means within the meaning of the Foreign Jurisdiction Act, 1890. "The territory of the said Protectorate is foreign territory under "Her Majesty's protection. It has never been acquired by settle- "ment or ceded to or conquered or annexed by Her Majesty or "any of Her Royal Predecessors nor has Her Majesty or any of "Her Royal Predecessors recognised the same as, nor is it, part "of Her Dominions, but She has power and jurisdiction within "the same. The aforesaid Northern Rhodesia continues to exist "as a Protectorate as aforesaid since the enactment of the "Rhodesia and Nyasaland Federation Act, 1953. 3. I have not "the custody of Andrew Mwenya, nor have I control over his "custody, nor have I ordered Andrew Mwenya to remain in the "Mporokoso District or given any instruction to that effect. As "Her Majesty's Secretary of State for the Colonies I can only "advise Her Majesty with regard to the exercise of Her power "and jurisdiction in Northern Rhodesia and communicate Her "Majesty's orders and instructions to His Excellency the "Governor. Save in the sense that I am not prepared to advise "Her Majesty to approve the policy of instructing His Excellency "the Governor to revoke the restriction order made by His "Excellency in regard to Andrew Mwenya or any Order in "Council or Ordinance empowering His Excellency the Governor "to make such orders, I have not detained Andrew Mwenya or "ordered him to remain in any area, nor do I detain him nor is he "ordered by me to remain in any area, and I have not and have "not had the custody of Andrew Mwenya."

According to an affidavit sworn by the Attorney-General for the Federation of Nigeria, formerly Attorney-General for Northern Rhodesia from 1951 to 1956, the present constitution of Northern Rhodesia was created by the Northern Rhodesia Orders in Council, 1924 to 1927, and the Northern Rhodesia (Legislative Council) Order in Council, 1959, and "3. The Governor of Northern Rhodesia "is appointed by Her Majesty and is authorised to exercise on "Her Majesty's behalf all such powers and jurisdiction as Her "Majesty possesses within the territory and do and execute all "things as may fall within the terms of Orders in Council relating "to the territory or by instructions as may from time to time "be given to him (inter alia) by Her Majesty acting through one "of Her Principal Secretaries of State. The Governor must in "performing his office observe such laws as are now or shall hereafter be in force in the territory. . . . 4. The Order in Council of "1924 provided that there should be a Court of Record called the "High Court of Northern Rhodesia with full jurisdiction, civil "and criminal, over all persons and all matters within Northern "Rhodesia. . . . The civil and criminal jurisdiction of this court "is and was so far as circumstances admit to be exercised upon "the principles of and in conformity with the substance of the "law for the time being in force in and for England and with the "powers vested in and according to the course of procedure and "practice observed by and before Courts of Justice in England "except so far as such law may be inapplicable or may be modified by Order in Council, Regulations or Proclamations or "Ordinances of the Legislature of Northern Rhodesia. . . . 6. I "am of the opinion that the High Court of Northern Rhodesia "has authority to grant and issue writs of habeas corpus ad subjiciendum and other prerogative writs and to ensure the due "execution thereof in Northern Rhodesia by virtue of the constitutional provisions hereinbefore referred to and sections 10 to 12 "inclusive of the High Court Ordinance of Northern Rhodesia."

On the resumed hearing preliminary objections were taken by the respondents to the jurisdiction of the court to issue the writ.

Neil Lawson Q.C. and *B. H. Anns* for the applicant.

Sir Reginald Manningham-Buller Q.C., A.-G., and *J. R. Cumming-Bruce* for the Secretary of State for the Colonies. It is not accepted that the restriction orders amount to such a degree of confinement as would justify the issue of a writ of habeas corpus, but, assuming for the purposes of argument that they do, the objections are taken (1) that this court has no jurisdiction to issue the writ to persons in a protectorate, and (2) that, in the circumstances, the writ cannot issue to the Secretary of State. As to (1), *Ex parte Anderson* [3] established that the writ could issue to any part of Her Majesty's dominions, but the cases there cited also established that it cannot go to any foreign country not forming part of Her Majesty's dominions, for example, *Rex* v. *Cowle*,[4] *per* Lord Mansfield. Immediately after, and in effect reversing, the decision in *Ex parte Anderson*,[5] the Habeas Corpus Act, 1862, was passed, section 1 of which, as interpreted in *Rex* v. *Earl of Crewe, Ex parte Sekgome*,[6] made it clear beyond doubt that after 1862 there was no jurisdiction to issue the writ to any colony or foreign dominion where there were lawfully established courts with authority and power to issue it. But it is submitted that this case does not depend upon the Act of 1862 and that it does not apply, because there never was—and is not now—power to issue the writ outside the dominions and territories belonging to Her Majesty. In *Sekgome's* case [6] Vaughan Williams L.J. said [7] that the Act of 1862 had no effect in the Bechuanaland Protectorate because "it applies only to the territorial dominions "of the Crown," and that [8] "the legislature intended by the "word 'dominion' territorial dominion, and not dominion in the "sense of power," and Kennedy L.J. also held [9] that the protectorate formed no part of His Majesty's dominions of the Crown within section 1.

[LORD PARKER C.J. What protectorates were in existence in 1862?]

Protectorates in the modern sense may not have existed then, but the Foreign Jurisdiction Acts, the first of which was passed in 1843, show that there was an exercise of jurisdiction by the Crown in territories not belonging to the Crown. Such territories, and the modern protectorates, although under the dominion of the Crown in the sense of the exercise of power and jurisdiction, are not under the dominion of the Crown in the sense of territorial dominion: see the view of Vaughan Williams L.J. in *Sekgome's* case.[10] See also *per* Farwell L.J.[11] in the same case that a protectorate for the purposes of the Foreign Jurisdiction Acts "means territory outside the dominions of the Crown, but over "which the Crown exercises some jurisdiction," and the view of Kennedy L.J.[12] that there was there no "'dominium' . . . "sometimes described as territorial sovereignty. The protected "country remains in regard to the protecting State a foreign "country." The reference to dominions in the Habeas Corpus Act, 1862, therefore, is no justification for saying that the court could issue the writ to any territory affected by powers pursuant to the Foreign Jurisdiction Acts, and the same meaning of "territorial dominion" there attributed to the word should be given to it where it appears in the early authorities. The Protectorate of Northern Rhodesia is not a territorial dominion of the Crown, nor is it under subjection to the Crown, but it is foreign territory in which the Crown exercises jurisdiction pursuant to the Foreign Jurisdiction Acts. It would be strange if a writ which is not issuable to a dominion or colony of the Crown could be issued to a protectorate which is not and never has been part of Her Majesty's dominions in the territorial sense; if it could issue into such a territory not belonging to Her Majesty, it could equally issue into the United States of America.

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[3] (1861) 3 E. & E. 487.

[4] (1759) 2 Burr. 834, 856.

[5] 3 E. & E. 487.

[6] [1910] 2 K.B. 576; 26 T.L.R. 439.

[7] [1910] 2 K.B. 576, 591.

[8] Ibid. 592.

[9] Ibid. 624.

[10] Ibid. 603, 604.

[11] Ibid. 611.

The court cannot enlarge its own jurisdiction and should not issue the writ in this case unless there is a precedent for doing so. There is in fact no such precedent, for the writ never has issued to a foreign country. In *Sekgome's* case Kennedy L.J. said [13] that if, as he thought, the Bechuanaland Protectorate was foreign territory, "there is no authority, so far as I am aware, "which would justify the issue of the writ"; the view of Vaughan Williams L.J.[14] that there might be jurisdiction to issue the writ to Bechuanaland is obiter, since he came to the conclusion that the detention in that case was lawful, while Farwell L.J. appears to have expressed no final opinion on this point. In *In re Ning Yi-Ching* [15] Cassels J., deciding the actual question on which those views were expressed, preferred [15] that of Kennedy L.J.[16] and held that there was no jurisdiction to issue the writ to foreign territory in respect of a foreigner detained there: see also *Rex* v. *Pinckney*.[17]

[LORD PARKER C.J. How do you reconcile your argument with the fact that the Crown in setting up courts within the territory with power to issue prerogative writs is exercising that power over a territory not forming part of the dominions of the Crown. Might it not be that in the past the matter turned not upon the right to issue the writ but upon enforceability; if there is sufficient control in the territory to enforce the writ, why, in principle, should it not issue?]

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[12] [1910] 2 K.B. 576, 620.

[13] Ibid. 624.

[14] Ibid. 605.

[15] (1939) 56 T.L.R. 3, 5.

[16] [1910] 2 K.B. 576, 624.

[17] [1904] 2 K.B. 84; 20 T.L.R. 363.

The exercise by the Crown of powers or the setting up of courts in a foreign territory under the provisions of the Foreign Jurisdiction Acts cannot affect or enlarge the jurisdiction of this court in relation to that foreign territory. There is no authority which appears to have turned upon the question of enforceability; if it were relevant it would mean that the jurisdiction of this court in relation to foreign territories would vary from case to case, according to the degree of control exercised by the Crown. All the prerogative writs have always been limited in their application to territories forming part of the dominions or colonies of the Crown, and the existence of local courts, whether or not they have power to issue the writ, has no bearing on the jurisdiction of this court in relation to a foreign territory.

The onus is on the applicant to satisfy the court, not that it is desirable that the writ should issue, but that the court has in fact jurisdiction to issue it to persons outside Her Majesty's dominions and colonies. There is no such jurisdiction and the application should be dismissed on that ground.

B. J. M. MacKenna Q.C. and *J. G. Le Quesne*, for the Governor and District Commissioner, adopted the argument for the Secretary of State. No jurisdiction in this respect has been conferred on the court by statute, and therefore what has to be seen is whether the superior courts in Westminster, whose jurisdiction was transferred to this court, had power to issue the writ out of this realm and out of the Queen's territorial dominions. There is no case in which those courts did in fact so issue the writ. The ground of the decision in *Ex parte Anderson*,[18] and the fact on which it was emphasised that the court relied, was that Canada was part of the Queen's dominions. That that was so is shown by the authorities and precedents cited in the argument and in the judgment, and also by subsequent references to the decision, in some cases by judges who had formed the court: see, for example, *In re Mansergh*[19] and *Ex parte Brown.*[20] It is clear, therefore, that that decision should not be enlarged. *Ex*

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[18] 3 E. & E. 487.

[19] (1861) 1 B. & S. 400.

[20] (1864) 5 B. & S. 280.

parte Brown[21] does not appear to have been cited in *Sekgome's* case.[22] Furthermore, it is implicit in the Act of 1862 that there was no jurisdiction to issue the writ into territories such as Northern Rhodesia, for it cannot be supposed that Parliament understood that there was jurisdiction to issue it into all foreign territories, yet legislated merely to limit that jurisdiction to dominions and colonies of the Crown.

[LORD PARKER C.J. To what extent are we assisted by the principle that the court may inquire into the rights of the Crown by treaty, cession, sufferance or conquest in a foreign territory?]

Such inquiry is only relevant when the powers of the Crown to establish courts in the territory are in question. The courts of this country will not, except as a matter of procedure, inquire into the extent of the Crown's power and jurisdiction in a foreign territory. The fact that courts have been established in Northern Rhodesia under powers contained in Foreign Jurisdiction Acts has no effect on the jurisdiction of the court: had the territory been conquered or annexed and courts established there, the complete and unfettered powers of Her Majesty in the territory could not be affected or restricted by anything this court might do. Nor does the establishment of courts in the territory with power to issue the writ enlarge the jurisdiction of this court; the giving of a concurrent jurisdiction to this court cannot be read into the Order in Council. The view of Kennedy L.J. in *Sekgome's* case[23] that there was no power to issue the writ into a protectorate formed part of his ratio decidendi in that case: see his dismissal of the appeal and reference to[24] "other substantial "grounds." "Queen's dominions" in the judgment of Cockburn C.J. in *Anderson's* case[25] were there given the same meaning as "His Majesty's dominions" in the Act of 1862. Once the conclusion is reached that a protectorate is not part of the territorial dominions of the Crown this court has no jurisdiction to issue the writ into it.

Neil Lawson Q.C. and *Bryan Anns* for the applicant. Where a British subject is unlawfully detained by servants of the Crown in a territory which does not belong to the Crown but is nevertheless in a state of complete subjection to the Crown, he is entitled to the issue of the writ of habeas corpus irrespective of whether or not there are courts capable of granting the remedy in the territory where he is detained. It is conceded that the court cannot inquire into the nature and basis of the jurisdiction of the Crown in a foreign territory, but it is entitled to consider the substance of the power which is in fact exercised there, and in so doing may have regard to the relevant legislation by Order in Council made pursuant to the Foreign Jurisdiction Act, 1890. Consideration of such legislation establishes that Northern Rhodesia is in a state of maximum subjection to the Crown; the Crown by Order in Council and otherwise has in fact established a complete system of governmental administration with a legislature, an executive and machinery for the administration of justice and a more or less complete code of laws. Such a state of subjection, although falling short of territorial sovereignty, amounts to sufficient dominion on the part of the Crown to justify the issue of the writ as an exercise of the Royal prerogative. Reliance is placed on *Rex* v. *Cowle*,[26] where Lord Mansfield C.J. said,[27] as to prerogative writs, that "upon a proper case, they may issue "to every dominion of the Crown of England. There is no doubt "as to the power of this court; where the place is under the "subjection of the Crown of England; the only question is, as "to its propriety."

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[21] 5 B. & S. 280.

[22] [1910] 2 K.B. 576.

[23] Ibid. 624.

[24] Ibid. 629.

[25] 3 E. & E. 487, 494.

Prima facie, a writ by which a private citizen seeks a remedy or to recover some relief cannot be issued out of England, but a mandatory writ such as habeas corpus is not limited territorially; it follows "subjection and ligeance, in what country or nation "soever the subject is": see *Calvin's Case* [28]; see also *Richard Bourn's Case*,[29] where Montague C.J., distinguishing between the privilege of the Cinque-ports as to writs between party and party and privilege against the King, said [30] that habeas corpus was "a prerogative writ, which concerns the King's justice to "be administered to his subjects; for the King ought to have "an account why any of his subjects are imprisoned; and it is "agreeable to all persons and places." *Pinckney's* case [31] should be distinguished in this respect. *Ex parte Anderson* [32] is clear authority for this proposition. Although that decision does appear to have been questioned in *In re Mansergh* [33] and *Ex parte Brown*,[34] the court did in fact issue the writ to Canada. Moreover, it did so because it was satisfied not only in theory but in practice that there was jurisdiction to do so, and notwithstanding that there were competent local courts. The judgment of Cockburn C.J.[35] is clear and unqualified and it is submitted that there is no justification for criticism of the decision. As to *In re Mansergh*,[36] where the civil rights of an applicant for certiorari who was in military service were in question, see the observation of Lord Goddard C.J. in *Rex* v. *Secretary of State for War, Ex parte Price*[37]: "I do not mean to let it go forth that this court "is necessarily of opinion that that passage in *Mansergh's* case[38] "means that this court has no jurisdiction to grant the writ" of certiorari if there were no competent courts in the country. The Isle of Man was not a part of England, but in *Ex parte Brown*[39] the writ issued there because it was held of the Crown by a grantee, and, therefore, although not a foreign dominion, was part of the territorial dominions of the Crown.

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[26] 2 Burr. 834.

[27] Ibid. 855.

[28] (1609) 7 Co.Rep. 1, 20a.

[29] (1620) 2 Cro.Jac. 543.

[30] Ibid. 543.

[31] [1904] 2 K.B. 84.

[32] 3 E. & E. 487.

[33] 1 B. & S. 400.

[34] 5 B. & S. 280.

There is abundant authority that there is no territorial limit to the jurisdiction of the court, and the writ has issued, inter alia, to Canada, to Calais, to St. Helena (*Ex parte Lees*[40]), to the Isle of Man and to the Channel Isles. [Reference was also made to *Rex* v. *Cowle*.[41]]

It is not contended that there is jurisdiction to issue the writ to a person in a foreign territory who is not a servant of the Crown, but that is a very different thing from saying that it will not issue to a British subject in a territory which is in subjection to the Crown. [Reference was also made to *Ex parte Wyatt*.[42]] In so far as *Pinckney's* case[43] is relied on as an authority that the writ will in no circumstances issue out of England, it is submitted that it is wrong.

Allegiance is relevant: *Calvin's Case*.[44] The writ is in the form of a command by Her Majesty to an individual, and the answer to the question where will the Queen's writ run depends not upon a territorial limitation but upon whether the person to whom it is addressed is under an obligation to obey the command. The territorial aspect may be relevant, but only as to effectiveness; the courts would not encourage an application if the effect of the writ would be nugatory, but in the case of a Crown servant, or of a territory such as Northern Rhodesia, the question of effectiveness does not arise. The passage in Halsbury's Laws of England, 3rd ed., vol. 11, p. 24 et seq., paras. 42, 43, is adopted as part of the argument for the applicant on this point. There is a duty to safeguard the liberty of all subjects of the Crown and also that of all persons within the realm. In principle the writ should go whenever there has been an unlawful act by a servant of the Crown, for if Her Majesty may not inquire why someone entitled to her protection is unlawfully detained, that protection is endangered. The basic question for this court is: Is this a case in which Her Majesty should exercise her right to inquire why a person entitled to her protection is detained?

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[35] 3 E. & E. 487, 494.

[36] 1 B. & S. 400.

[37] [1949] 1 K.B. 1, 6; 64 T.L.R. 528.

[38] 1 B. & S. 400, 410, 411.

[39] 5 B. & S. 280.

[40] (1860) E.B. & E. 828 [see 3 E. & E. 487, 492, 493].

[41] 2 Burr. 834.

[42] (1836) 5 Dowl. 389.

[43] [1904] 2 K.B. 84.

[44] 7 Co.Rep. 1.

The only reason why the court may not now issue the writ to the colonies and dominions is that Parliament by the Habeas Corpus Act, 1862, has curtailed its power to do so. But that the Act contains no limitation of the court's power in relation to a protectorate does not mean that in 1862 there was no such power. In 1861 the Crown exercised jurisdiction in two categories of overseas territories, self-governing colonies with constitutional institutions and courts administering a code of law, and, normally under treaties, other places such as Constantinople or Cairo, or Borneo, where the British consul had rights over, and could decide disputes between, British subjects. It is understandable that, when considering the latter category, Parliament would desire to preserve the rights of British subjects, subjected to an abnormal jurisdiction in territories forming no part of the dominions of the Crown, to apply to this court for a writ of habeas corpus. The modern conception of protectorates in which there is a full scale exercise of sovereign power arose in the 1880s and was not in the contemplation of Parliament in 1862, but although the distinction between dominion of the Crown in the territorial sense and territories in subjection to the Crown may not have been material either at the time of *In re Anderson*[45] or when the Act of 1862 was passed, the language of section 1 of that Act is consistent with the view that the court had jurisdiction to issue the writ overseas.

It is conceded that there is no case in which a writ of habeas corpus has in fact issued to a protectorate or to a foreign country in which Her Majesty exercises power and jurisdiction under the Foreign Jurisdiction Act, 1890, but both in principle and on the authorities, there is a clear jurisdiction. Reliance is placed on the views of Vaughan Williams and Farwell L.JJ. in *Rex* v. *Earl*

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[45] 3 E. & E. 487.

of Crewe, Ex parte Sekgome.[46] It should be appreciated that the Divisional Court decided that case on the assumption that the writ would go but for the Act of 1862, and in the Court of Appeal all three Lords Justices held that the application failed because the proclamation in question was valid; had there been no jurisdiction to issue the writ, it is surprising that the court should have gone into that question. The balance of dicta in that case is in the applicant's favour. If the test is whether or not the territory in question is in subjection to the Crown, *In re Ning Yi-Ching*[47] should be distinguished; that case was concerned with Tientsin, where the Crown held under a lease and had the right of administering justice to British subjects; further, it is not clear that the persons holding the applicants were British subjects, and the applicants themselves were neither British subjects nor British protected persons.

[LORD PARKER C.J. I should like to go back to first principles. What is the nature of the writ and how and by what right did the court come to exercise power to issue it overseas?]

At common law the court issues the writ as a manifestation of the Royal prerogative.

[WINN J. But the common law and the prerogative run only where the Crown is owner of the territory.]

That is not accepted. The exercise of legislative and governmental authority over territory not forming part of the dominions of the Crown but over which there is de facto control is the prerogative of the Crown, which prerogative can only be fettered by statute; the only fetter in fact is that as to the manner of its exercise contained in the Foreign Jurisdiction Act, 1890, and since one of the manifestations of the prerogative is the common law power of this court to grant habeas corpus, that power remains in the court until taken away by statute. Section 1 of the Act of 1890 shows that the legislature contemplated the exercise of the prerogative in the countries to which the Act applied in the same manner as in countries falling within the territorial dominions of the Crown: see, for example, section 7, the purpose of which was to preclude the remedy of habeas corpus in certain circumstances. The test is not whether there has been any case in which habeas corpus has issued to a protectorate; the distinction between a foreign dominion of the Crown and a territory in complete subjection to the Crown is comparatively recent. In *Sekgome's* case,[48] the only case in which the court has been asked to issue the writ to a protectorate, the application was not dismissed for want of jurisdiction but on other grounds.

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[46] [1910] 2 K.B. 576, 605. 618.

[47] 56 T.L.R. 3.

This is a special jurisdiction exercised by the court as a manifestation of the Royal prerogative; in the past the writ has issued to territories not within the normal jurisdiction of the common law courts, and it is submitted that there is a distinction between the jurisdiction to issue habeas corpus and the ordinary common law jurisdiction. The conception of territorial sovereignty is comparatively modern and in older times was of less importance than the feudal tie. In the past the writ has issued to territories not within the normal jurisdiction of the common law courts, and as early as 1680 Wild J. said in *Anon.*[49]: "These writs have "gone beyond sea." The fact that the Crown has exercised the prerogative in one particular way by Order in Council setting up local courts does not prevent or curtail its exercise in another facet: see *Sobhuza II* v. *Miller*,[50] *North Charterland Exploration Co. (1910) Ltd.* v. *Rex*[51] and *Nyali Ltd.* v. *Attorney-General.*[52] Unless some statute otherwise provides, as does the Act of 1862 in the case of foreign dominions, or the power has been surrendered, the jurisdiction of this court remains unaffected. The mere establishment by the Crown of courts in Northern Rhodesia with power to issue habeas corpus has not exhausted the Royal prerogative in that respect or qualified it to the extent that the jurisdiction of this court is taken away, and this court's jurisdiction is concurrent with that of the courts in Northern Rhodesia. That resort has in practice been made only to the local courts is a question of convenience and not of significance.

Sir Reginald Manningham-Buller Q.C., A.-G. in reply. There is no distinction so far as jurisdiction is concerned between the writ of habeas corpus and other common law writs between party and party; the latter are also issued in the name of the Crown. [Reference was also made to *Crowley's Case.*[53]] As to the nature of the Royal prerogative, the best definition is given in Blackstone's Commentaries, vol. 1, p. 239, as "That special pre-eminence, which the King hath, over and "above all other persons and out of the ordinary course of the "common law, in right of his Royal dignity. It signifies, in its "etymology, (from prae & rogo) something that is required or

[48] [1910] 2 K.B. 576.

[49] (1680) Carter 221, 222.

[50] [1926] A.C. 518; 42 T.L.R. 446.

[51] [1931] 1 Ch. 169; 46 T.L.R. 566.

[52] [1956] 1 Q.B. 1; [1955] 2 W.L.R. 649; [1955] 1 All E.R. 646.

[53] (1818) 2 Swanst. 1.

"demanded before, or in preference to, all others. . . ." It would seem that in the early days the King issued writs to command the evidence before him of certain persons and that that power was exercised by the curia regis which developed the exclusive power of issuing writs of habeas corpus ad subjiciendum. The courts "gained a known and stated jurisdiction" to which the King himself could not make addition without the consent of Parliament: see Chitty's Prerogatives of the Crown, c. 7, pp. 75, 76. The vital question in this case, therefore, is: What was that known jurisdiction? It was originally exercised throughout England, and then in Wales and, as the King's dominions developed, throughout the King's dominions as they developed. But if it did not extend to foreign dominions belonging to the King by right of succession (*Rex* v. *Cowle*,[54] *per* Lord Mansfield[55]), a fortiori it did not extend to a foreign dominion which did not belong to the King at all. The reference by Cockburn C.J. in *Anderson's* case[56] to the writ as issuing throughout the Queen's dominions must be taken as meaning dominions belonging to the Crown. The authorities are at one on this point. The writ referred to in *Calvin's Case*[57] as having been issued to the Mayor of Burdeaux was not a writ of habeas corpus but a command requiring information whether a certain person was in the employ of the Mayor—the old equivalent of a request to interparl and quite different in character from habeas corpus.

The argument for the Secretary of State on this issue is based on the simple contention that there never has been and is not now any jurisdiction to issue the writ outside Her Majesty's dominions. The applicant is asking the court to extend *Anderson's* case,[58] but if the court were to do so it would mean that its jurisdiction is exercisable in foreign territories no matter to whom the territory belongs and no matter to what extent the Crown exercises power there. The answer to this case was stated by Lord Mansfield in *Rex* v. *Cowle*[59] when he said that the court has no power to send a writ of any kind to foreign dominions of which the King is sovereign by virtue of succession. There is no authority that the fact that the Crown exercises certain powers and jurisdiction in a territory which is not a dominion of the Crown effects an enlargement of the jurisdiction of this court, and it does not assist the applicant to argue that protectorates are a modern conception. The issue of habeas corpus by the court is an exercise of the Royal prerogative delegated to it by the Crown; its power to issue the writ is exercisable as part of the common law of this country and can only be extended by statute, as it was, for example, by the Habeas Corpus Act, 1804. The area of the court's jurisdiction is accurately summarised in Halsbury's Laws of England, 3rd ed., vol. 9, p. 356, para. 831.

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[54] 2 Burr. 834.

[55] Ibid. 856.

[56] 3 E. & E. 487, 494.

[57] 7 Co.Rep. 1, 20a.

[58] 3 E. & E. 487.

[59] 2 Burr. 834, 856.

The argument that the writ will issue when there is a detention of a British subject by a servant of the Crown is also without authority. It is immaterial whether the applicant is a British subject.

[LORD PARKER C.J. What would be the position if the Governor or the District Commissioner came to this country?]

The court can compel the attendance of a person who is in fact within its jurisdiction; if it were satisfied that such a person by his servants or agents held someone in unlawful detention, that would be constructive custody and the court could issue the writ. For instance, if a person within the country had caused an individual to be sent out of the country and to be held—for example, on a yacht—he might properly be called upon to give an account of the body; but if the gaoler of a French prison were to come here for a holiday, the court would refuse to issue habeas corpus to him on the ground that it would be contrary to the comity of nations that it should inquire into the legality of the detention in territory outside its jurisdiction. It would be equally wrong, if the Governor or District Commissioner were to come to this country, for the court to issue the writ in order to inquire into the legality of a detention in Northern Rhodesia, a foreign country. Not only would it be wrong but the court would not do so because there are courts there which are competent to make the inquiry.

MacKenna Q.C. in reply. There is no special power in the court to issue the writ to servants of the Crown in a foreign country. The statement in *Calvin's Case* [60] that mandatory writs "follow subjection and ligeance, in what country or nation soever "the subject is" is unsupported by authority; all that was there referred to was the issue of two writs, a writ of right of ward against one whose husband was exiled into Gascoin, and the writ to the Mayor of Burdeaux, Gascogny being then, according to the report, under the King's obedience.

As to the proposition that there is power to issue habeas corpus to territories in subjection to the Crown, those words not being precisely defined, the applicant is compelled by the Act of 1862 to invite the court to hold that there is for this purpose a tertium quid—a state falling short of a dominion of the Crown yet not a foreign country. But no such tertium quid exists; the phrase "in subjection to the Crown" is used in the authorities and the textbooks to denote territories peopled by subjects of the Crown as synonymous for "dominions of the Crown," while a protectorate, no matter how it came into existence and no matter what powers are exercised by the Crown therein, remains a foreign territory outside the Crown's dominions. The argument by reference to extraordinary jurisdiction exercised over British subjects overseas that the explanation of the apparent paradox in the Act of 1862 is that Parliament intended to take away only part of the court's jurisdiction is not well founded, for in 1858 Presidency Courts had been set up in India under Royal Charter with jurisdiction to exercise powers by reference to the powers of the Superior Courts at Westminster, while in the Ionian Islands, a Protectorate under the Treaty of Paris, 1815, an elaborate judicial system with civil and criminal codes and a right of appeal had been established. Nor could the inadequacy of local courts have been a reason for the exception of certain territories from the operation of the Act, because the right of application to this court was only taken away where the local courts were competent to grant the remedy.

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[60] 7 Co.Rep. 1, 20a.

Sobhuza II v. *Miller*[61] is not in point. The argument that the exercise of one facet of the Royal prerogative in Northern Rhodesia does not prevent its exercise in this country in another facet by the issue of the writ to Northern Rhodesia depends upon the mistaken assumption that the Crown had a prerogative in this country to issue the writ to Northern Rhodesia. Prerogative means no more than powers; Her Majesty has some powers which she may exercise in this country and other powers which she may exercise in Northern Rhodesia, but the exercise of the powers in relation to Northern Rhodesia does not add to the powers exercisable in this country, and the courts in this country cannot derive power to issue the writ by reason of the exercise by Her Majesty of quite different powers in Northern Rhodesia.

[LORD PARKER C.J. The natural limitation of the power of this court to issue the writ would seem to be within the realm, but it is clear that in fact its jurisdiction has not been so limited and that prior to the Act of 1862 there was power to issue it in the case of a detention anywhere within the territorial dominions of the Crown. What was the cause of that extension?]

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[61] [1926] A.C. 518.

There seems to be no better explanation than that the territories to which the writ was issued, such as the Isle of Man, the Channel Islands and Berwick were all part of the King's dominions; they lay close to this country and it may well have been that there were no local facilities for relief. Lord Mansfield in *Rex* v. *Cowle* [62] did refer to the writ as having been issued to the plantations, but there is no reported case, apart from *Ex parte Lees*,[63] the St. Helena case, in which it did in fact issue to the plantations, and in that case, which was decided after *Rex* v. *Cowle*,[64] doubts were expressed as to the jurisdiction.

[Lord Parker C.J. We have come to the conclusion, for reasons which we will give at a later date, that we have no jurisdiction to issue the writ to the Governor of Northern Rhodesia or the District Commissioner of the Mporokoso District in respect of the alleged confinement of the applicant.]

The application against the Governor and the District Commissioner was accordingly dismissed and, on the application of the Attorney-General, the court intimated that the most convenient course would be for argument to be heard on the question whether the Secretary of State by reason of his constitutional position had sufficient custody of the applicant to be amenable to the writ.

Lawson Q.C. for the applicant. The Secretary of State has sufficient custody. It is immaterial that the detention is taking place outside this country and also that the actual detention is by other persons: see *Barnardo* v. *Ford*, *Gossage's* case,[65] where the opinions in the House of Lords appear to have been delivered on the basis that the body was outside the kingdom, and *Rex* v. *Secretary of State for Home Affairs, Ex parte O'Brien*,[66] where the writ issued to the Home Secretary notwithstanding that he had surrendered the applicant to the Government of the Irish Free State and had lost legal control. *Barnardo* v. *Ford* [67] also shows that the writ may issue to a person whose control of the custody is remote. It is appreciated that in *O'Brien's* case [68] the Home Secretary had personally made the order for detention, but a parallel may nevertheless be drawn with this case, because here the illegality of the detention springs from the failure of the executive in this country to comply with the requirements of an Imperial Statute. Furthermore, that case shows that the writ will issue on the merest scintilla of evidence of control; in fact on the return to the writ the Home Secretary did produce the body, and here, when the persons detaining the applicant are members of the Colonial Service of which the Secretary of State is the head, the court can have no doubt that if the writ were issued he would produce the body. In *Rex* v. *Earl of Crewe, Ex parte Sekgome* [69] both Vaughan Williams [70] and Farwell L.JJ.[71] doubted the view of the Divisional Court that the Secretary of State was not a custodian; Vaughan Williams L.J. was [72] disposed to say that the writ might be addressed to any person who had such control over the imprisonment that he could order the release, while Kennedy L.J., although of the opinion that the writ should not be directed to the Secretary of State, went on to say [73] that it could properly be issued to the executive or administrative superior of the actual custodian if he was a person on whose authority the custodian must rely in order to justify the detention and to whom obedience must be rendered by the custodian if he ordered the release. [Reference was also made to *In re Ning Yi-Ching.*[74]] For cases in which a Secretary of State was a party to habeas corpus proceedings when there had been no direct act or order by him in relation to the detention, see *Rex* v. *Secretary of State for Foreign Affairs, Ex parte Greenberg,*[75] *Rex* v. *Secretary of State for War, Ex parte Martyn* [76] and *Rex* v. *Secretary of State for War, Ex parte Price.*[77]

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[62] 2 Burr. 834, 856.

[63] E.B. & E. 828.

[64] 2 Burr. 834.

[65] [1892] A.C. 326; 8 T.L.R. 728.

[66] [1923] 2 K.B. 361 (C.A.); [1923] A.C. 603 (H.L.).

[67] [1892] A.C. 326.

[68] [1923] 2 K.B. 361; [1923] A.C. 603.

The court should not permit a principal officer of the executive to shelter behind his constitutional position as adviser to the Crown, but in every case will inquire into the precise role he plays in accordance with fact and the constitution. Pursuant to the Foreign Jurisdiction Act, 1890, the Crown exercises jurisdiction in protectorates by Order in Council made by Her Majesty who constitutionally acts on the advice of the Secretary of State, but consideration of the relevant Orders in Council and the powers vested in him show that the Secretary of State has sufficient de facto control over the detention to make him amenable to the writ. For instance, by article 7 of the Northern Rhodesia Order in Council, 1924 [1924, No. 324], the main constitutional instrument which set up a Governor and a legislative council, the Governor is authorised to exercise all powers and jurisdiction on behalf of His Majesty, according, inter alia, " to such instructions " as may from time to time be given to him . . . by His Majesty " through one of His Majesty's principal Secretaries of State "; article 15 empowered the Governor " subject to any directions of " a Secretary of State " to constitute and appoint public officers and prescribe their duties; and by article 43 (1), as amended by article 9 of the Northern Rhodesia (Crown Lands and Native Reserve) Order in Council, 1928 (S.I. 1928, No. 246), the approval of the Secretary of State must be obtained before a native can be removed from native reserves (which now include the Mporokoso District), except in the execution of the process of a competent court. Further, article 24 (2) of the Northern Rhodesia Legislative Council Order in Council, 1959 (No. 105 of 1959), provides that if the Governor exercises the powers reserved in article 24 (1) of declaring that bills which the Council have failed to pass shall have effect, he must report the same to the Secretary of State, and article 25 of the same Order in Council reserves approval of certain categories of bills relating to natives to Her Majesty unless the Governor has been authorised by the Secretary of State to consent thereto. Under article 26 Her Majesty may through the Secretary of State disallow any territorial law assented to by the Governor. There is, therefore, a power of disallowance by Her Majesty through the Secretary of State of, inter alia, the Proclamation of 1956 and the Emergency Regulations under which the restriction orders in question here were made, and the powers of the Secretary of State are in fact more than mere advisory powers; they are specific powers and he could, if called upon to do so, produce the body before the court.

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[69] [1910] 2 K.B. 576.

[70] Ibid. 592.

[71] Ibid. 618.

[72] Ibid. 592.

[73] Ibid. 629.

[74] 56 T.L.R. 3.

[75] [1947] 2 All E.R. 550.

[76] (1949) 65 T.L.R. 102; [1949] 1 All E.R. 242.

[77] [1949] 1 K.B. 1; 64 T.L.R. 528.

If it appears that the powers of the executive are being misused—that is, that there is an illegal detention with which the executive is concerned—the court will intervene: *Rex* v. *Governor of Brixton Prison, Ex parte Sarno.*[78] A servant of the Crown cannot shelter behind the Royal immunity from process, and if the Secretary of State in fact apart from theory has power to give orders or tender advice which constitutionally must be accepted, the writ will issue. It should not be assumed that, were the court to conclude that the detention is illegal, the Secretary of State would not exercise his powers to bring it to an end.

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[78] [1916] 2 K.B. 742; 32 T.L.R. 717.

Sir Reginald Manningham-Buller Q.C., A.-G., for the Secretary of State. The application as against the Secretary of State is misconceived. The writ, whether it relates to deprivation of liberty or to the nurture and education of children, can issue only to persons who have custody of the body; that custody may be actual or constructive, but before the writ will issue it must be established, first, that there is a sufficient degree of custody, and, secondly, that the person to whom it is sought to be directed is in fact the custodian actual or constructive at the time of the application. That that is so is shown by the nature of the writ itself, as to which see Coke's Institutes, Part 2, p. 53, and Bacon's Abridgment, Tit. Habeas Corpus (b) 6, 9, where it is emphasised that it goes to a particular person: see also Blackstone's Commentaries, vol. 3, p. 131. In *Barnardo* v. *Ford* [79] it was made clear that the writ would not issue as a punitive measure against a person who had had custody, but only to persons who in fact had, or were thought to have, custody. In that case the writ only issued to the respondent so that on the return he could make a fuller explanation and satisfy the court that he no longer had custody, and, had the court been satisfied that he was no longer the custodian, it would not have issued. In this case the Secretary of State has never, either at the beginning or at any time since, been the custodian in any sense at all. [Reference was also made to *Rex* v. *Earl of Crewe, Ex parte Sekgome*.[80]] The Emergency Powers Order in Council, 1939, empowered the Governor, after proclamation of a state of emergency, to make emergency regulations of a wide character, and the Emergency Regulations, 1956, were made by him pursuant to that power. The original restriction order relating to the applicant was made by the Governor under regulation 18 of those regulations and, whether or not there was any illegality, the restriction has throughout been the act of the Governor in which the Secretary of State had no part. The Governor was not acting on the orders of the Secretary of State; the Secretary of State did not consent, nor was his consent required.

Where custody still exists in a person in this country in respect of a detention outside the country, no doubt the writ will issue, but it is not accepted that the fact that the body is outside this country is immaterial. In both *Barnardo* v.

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[79] [1892] A.C. 326.

[80] [1910] 2 K.B. 576.

Ford[81] and *O'Brien's* case[82] the custody was originally in this country, and in *O'Brien's* case[82] the Secretary of State had actually made the original order. *O'Brien's* case[83] does not establish that the writ will issue in the case of a detention by servants of the respondent: there the writ issued in order to give the Home Secretary an opportunity to make clear the extent of his control under the arrangement with the Government of the Irish Free State. There is, therefore, no authority for the proposition that, when a person is deprived of his liberty outside the British Dominions by British persons acting pursuant to the Foreign Jurisdiction Acts, the writ will issue against the Secretary of State merely because he is the head of the Civil Service.

Consideration of the Orders in Council relating to Northern Rhodesia, while showing that the Secretary of State has certain powers and duties, does not establish that he had a de facto control sufficient to constitute him in any sense a custodian of the applicant. To say that Her Majesty may give instructions to the Governor "through" the Secretary of State is not enough; he is a mere channel for the instructions. Nor is it enough to say that he might be able to disallow the Emergency Regulations, for that is a very different thing from saying that he can disallow a particular restriction order or a particular exercise of power by the Governor. The writ will not issue on the assumption that, because he has certain powers, other powers are vested in him, and it has not been shown that he can say to the Governor "Rescind this order." It is true that in *Sekgome's* case[84] Vaughan Williams L.J. said[85] that the writ need not necessarily be addressed to the gaoler or official in command of the gaol, but the Secretary of State is not the person in command and has no power to order that the cell door be unlocked. There is no question of the Secretary of State seeking to shelter behind his constitutional position. The mere fact that a Minister advises the Crown does not in a case such as this put him into the position of custodian, and the view of Kennedy L.J. in *Sekgome's* case[86] in this respect is well founded. A person who might advise or persuade a custodian to terminate the custody is not the "custodian" contemplated by the authorities. The writ lies against the custodian, not the persuader or adviser of the custodian.

Although the Secretary of State has himself no immunity from the process of this court, in the same way as the court has held that the writ will not issue out of its local jurisdiction, it would be wrong, whether regarded as an excess of jurisdiction or not, for the court to seek to inquire into acts performed wholly outside Her Majesty's dominions. But the court has no power to issue the writ for that purpose, and there is no way in which such power could have been acquired. If a British subject was detained illegally by a servant of the Crown in a foreign territory over which the Crown exercised no jurisdiction, such as France, the writ would not issue against the Foreign Secretary; he would not be a custodian in any sense of the word, yet if the principle asserted on behalf of the applicant be right, it would apply to the Foreign Secretary in such a case. It is significant that the extensions of the power to issue habeas corpus contained in the Habeas Corpus Act, 1803, are limited to the " part of the United " Kingdom in Great Britain or Northern Ireland called Great " Britain," and, in section 1 of the Habeas Corpus Act, 1816, to territorial dominions of the Crown. Here nothing has occurred in the dominions of Her Majesty within which the court is entitled to inquire. There is no question of an illegal detention of a British subject who has no right of redress; there is ample provision for investigation by the courts in Northern Rhodesia. *Rex* v. *Governor of Brixton Prison, Ex parte Sarno*[87] is not here in point. [Reference was also made to *Rex* v. *Secretary of State for War, Ex parte Martyn.*[88]] If there has been any misuse of power here, habeas corpus would not be the remedy. It is submitted that the Secretary of State has not a sufficient degree of control of the custody to render him amenable to the issue of the writ.

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[81] [1892] A.C. 326.

[82] [1923] 2 K.B. 361; [1923] A.C. 603.

[83] Ibid.

[84] [1910] 2 K.B. 576.

[85] Ibid. 592.

[86] Ibid. 629.

Lawson Q.C. in reply. It would be strange if a person in this country who caused a British subject to be imprisoned abroad were not amenable to the writ; other remedies might be available, but habeas corpus is the speediest and most efficacious. The submissions on behalf of the Secretary of State are contrary to the principles upon which the court proceeded in *Anderson's* case.[89] The writ is a personal command to a person to show cause why a subject of Her Majesty is restrained and it should not be regarded as territorial in nature. Writs of this kind have gone to countries abroad in the past and it is submitted that the fact that they have done so in the past is conclusive; it has been

[87] [1916] 2 K.B. 742.

[88] 65 T.L.R. 102.

[89] 3 E. & E. 487.

held to be no answer to say that, at the time of the application, the detention was taking place abroad, and, therefore, the question must always be: Has the respondent been shown to have sufficient custody or control to be called upon to make a return? The Habeas Corpus Acts of 1803 and 1816 were concerned with the writ of habeas corpus ad testificandum, service of which may well be territorially limited to England, and are not relevant to the court's jurisdiction in respect of the writ of habeas corpus ad subjiciendum. Moreover, those Acts lay down machinery for putting into operation a common law remedy, but in so doing they do not cut down the scope of the remedy. In view of the nature and importance of the writ, and bearing in mind that one of its objects is to protect the subject against the misuse of power by the executive, it is submitted that it will issue even if the evidence of control is very slight. Although the Secretary of State may not have taken any active part in the detention, the illegality was due to a failure by the executive to comply with statute, and it has been shown that he has sufficient control. Among his powers is the power of disallowing territorial laws; the Emergency Regulations of 1956, under which the restriction orders were made, is a territorial law, and if the Secretary of State were to exercise his power of disallowance the restriction order would automatically fail. The Governor is under a duty to act in accordance with the directions of Her Majesty communicated through the Secretary of State, and the court is entitled to take into consideration his constitutional position and the fact that he may give advice which would result in the termination of the detention. It ought not to be assumed that, were the Emergency Regulations held to be invalid, he would not be in a position to, or would not, take steps to release the applicant.

June 19. LORD PARKER C.J. The court is of the opinion, for reasons which will be given later, that a prima facie case has not been made out that the Secretary of State has sufficient control to constitute him a custodian to whom the writ will issue. The application must be dismissed.

Cur. adv. vult.

July 3. LORD PARKER C.J. read the following judgment of the court.

In these proceedings Mr. Lawson moves for a writ of habeas corpus to bring up the body of one Andrew Mwenya now wrongfully detained, so it is alleged, in the Mporokoso District of

Northern Rhodesia pursuant to restriction orders dated June 15 and October 5, 1957, made by the Governor of Northern Rhodesia. The ground of the application is that the orders were not validly made. It is directed to the Governor of Northern Rhodesia, the District Commissioner for the Mporokoso District and also to Her Majesty's Secretary of State for the Colonies.

The applicant is a native of Northern Rhodesia, having been born within that territory. At all material times Northern Rhodesia was a Protectorate and continues as such today despite the Rhodesia and Nyasaland Federation Act, 1953. In an affidavit by Her Majesty's Secretary of State for the Colonies sworn on June 12, 1959, it is stated that "The Northern Rhodesia "Protectorate is a foreign country within which Her Majesty "has power and jurisdiction by treaty, grant, usage, sufferance "and other lawful means within the meaning of the Foreign "Jurisdiction Act, 1890. The territory of the said Protectorate "is foreign territory under Her Majesty's protection. It has "never been acquired by settlement or ceded to or conquered "or annexed by Her Majesty or any of Her Royal Predecessors, "nor has Her Majesty or any of Her Royal Predecessors recog"nised the same as, nor is it, part of Her dominions, but She "has power and jurisdiction within the same."

The restriction orders provided that the applicant should remain within the area of Chief Mporokoso in the Mporokoso District, which comprises an area of about 1,500 square miles. The governor's powers to make such restriction orders flow from regulation 18 of the Emergency Powers Regulations, 1956, which provide that the governor, if satisfied that for the purpose of maintaining public order it is necessary so to do, may make a restriction order against any person. Those regulations were made pursuant to the Emergency Powers Order in Council, 1939, as amended by the Emergency Powers Orders in Council, 1952 and 1956, made by virtue of the powers conferred by the Foreign Jurisdiction Act, 1890.

The case for wrongful detention sought to be made by the applicant is based on the contention that those Orders in Council were statutory rules to which the Rules Publication Act, 1893 (repealed in 1946), applies. Section 1 (1) of that Act provided: "At least 40 days before making any statutory rules to which "this section applies, notice of the proposal to make the rules, "and of the place where copies of the draft rules may be obtained, "shall be published in the London Gazette."

That provision admittedly was not complied with, and in these circumstances the applicant contends that the Orders in Council were invalid, and further that the restriction orders, which depend ultimately upon the validity of those Orders in Council, are likewise invalid.

The respondents, on the other hand, contend that those Orders in Council were not statutory rules to which the Act of 1893 applied. The respondents further contend that in any event the restriction of the applicant's liberty of movement in the circumstances of this case does not constitute such a detention or confinement as would give him any right to relief by way of the issue of a writ of habeas corpus. Further the Secretary of State contends that such control as he can be said to have by way of advice to Her Majesty or otherwise is not sufficient to constitute him the custodian of the applicant and that, accordingly, the writ cannot issue to him. Those are the three substantive issues which arise in this case.

At the opening of the proceedings, however, a preliminary objection was taken on behalf of the respondents that in any event this court had no jurisdiction to issue the writ to custodians in a protectorate in respect of a detention in that protectorate, since the territory comprised in a protectorate is foreign territory.

For the purpose of this preliminary point the court was asked to assume: (1) that the applicant was a British subject; (2) that the said Orders in Council were invalid and that so, too, were other Orders in Council in regard to Northern Rhodesia, including that setting up a High Court having the power to issue the writ of habeas corpus; and (3) that the applicant's confinement was of such a nature as to enable him, if he had been confined in this country, to apply for the writ.

After hearing argument on this preliminary point the court, at the invitation of all parties, gave a ruling on the objection. We stated that we upheld the validity of the objection and dismissed the application as against the Governor of Northern Rhodesia and the District Commissioner.

The point, however, was not one which was decisive in favour of the Secretary of State and the proceedings accordingly continued against him.

We will now deal with this preliminary point and give the reasons for our decision thereon.

We start with this, that there is no precedent, so far as we know, for the issue of the writ into a protectorate. Such precedents as there are are confined to the issue of the writ into part of Her Majesty's dominions in the sense of the territorial dominions over which she is Sovereign. Thus the writ has gone to Calais, Jersey and Guernsey, Ireland, the Plantations and Canada.

Sir William Blackstone in his Commentaries, Vol. 3, p. 131, speaking of the writ, says: "This is a high prerogative writ, "and therefore by the common law issuing out of the Court of "King's Bench not only in term-time, but also during the "vacation, by a fiat from the chief justice or any other of the "judges, and running into all parts of the King's dominions: "for the King is at all times entitled to have an account, why "the liberty of any of his subjects is restrained, wherever that "restraint may be inflicted."

Again, in Bacon's Abridgment, Tit. Habeas Corpus (B) 2, it is said: "It hath been already observed, that the writ of "habeas corpus is a prerogative writ, and that therefore, by the "common law, it lies to any part of the King's dominions; for "the King ought to have an account why any of his subjects "are imprisoned, and therefore no answer will satisfy the writ, "but to return the cause with paratum habeo corpus, etc. "Hence it was holden, that this writ lay to Calais at the time "it was subject to the King of England. It hath been holden, "that this writ lies to the marches of Wales, as it does to all "other courts which derive their authority from the King, as "all the courts exercising jurisdiction within his dominions do; "and that being a prerogative writ, it does not come within "the rule brevia domini regis non currunt, etc., for that must "be understood of writs between party and party.

"Also, it hath been adjudged, that this writ lies to the "cinque Ports, to Berwick, although objected to have been part "of Scotland, and to the County Palatine."

In *Rex* v. *Cowle*[1] the question arose whether the court could issue to the justices of the town of Berwick a certiorari to return indictments against the defendants. The argument was that the court had no jurisdiction over Berwick where the proceedings were not according to the laws of England, but according to quite a different law. Lord Mansfield C.J., in delivering the opinion of the court, said[2]: "But, if Berwick was to be deemed

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[1] (1759) 2 Burr. 834.

[2] Ibid. 853, 854.

"a dominion of the Crown, and no part of the realm of England; "it may be under the control and superintendence of the King "in this court.

"The constitution given to Berwick by the Crown of England, "approved by Parliament, shows it necessarily is so; much "stronger than in the case of counties palatine or Wales. The "people of Berwick have not jura regalia, or a complete jurisdiction within themselves, like a county palatine: they have "no sovereign courts of the King within themselves, like Wales. "They are made a free borough, to hold in burgage, by rent. "Such a creature of law must necessarily be collected, as part "of a kingdom, and subordinate."

Again [3]: "Writs, not ministerially directed, (sometimes called "prerogative writs, because they are supposed to issue on the "part of the King), such as writs of mandamus, prohibition, "habeas corpus, certiorari, are restrained by no clause in the "constitution given to Berwick: upon a proper case, they may "issue to every dominion of the Crown of England.

"There is no doubt as to the power of this court; where the "place is under the subjection of the Crown of England; the "only question is, as to the propriety.

"To foreign dominions, which belong to a prince who succeeds to the Throne of England, this court has no power to "send any writ of any kind. We cannot send a habeas corpus "to Scotland, or to the electorate: but to Ireland, the Isle of "Man, the Plantations, and, as since the loss of the Duchy of "Normandy, they have been considered as annexed to the Crown, "in some respects, to Guernsey and Jersey, we may; and "formerly, it lay to Calais; which was a conquest, and yielded "to the Crown of England by the Treaty of Bretigny."

We take this to be clear authority that while the writ will issue into any part of the territorial dominions of the Crown, it will not issue to foreign territories even if such territories belong to a prince who succeeds to the Throne of England.

It is true that great reliance was placed by the applicant upon Lord Mansfield's reference to a place which is under the "subjection of the Crown of England," but we think that in its context it means no more than a place in a dominion of the Crown. Lord Mansfield was certainly not, we think, making a distinction between a place in a dominion and a place subjected to the Crown though not within its territorial dominion.

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[3] 2 Burr. 834, 855, 856.

Again in *Ex parte Anderson*[4] the court issued a writ to the sheriff of the County of York in Canada and to the keeper of the gaol of Toronto in that county to bring up the body of John Anderson. In giving judgment, Cockburn C.J., after referring to the inconvenience which might result from the fact that the colony had both legislative and judicial independence, said[5]: "Nevertheless, it is to be observed that, in establishing a local "judicature in Canada, our legislature has not gone so far as "expressly to abrogate the right of the superior Courts at West- "minster to issue the writ of habeas corpus to that province; "which writ, in the absence of any prohibitive enactment, goes "to all parts of the Queen's dominions. Lord Coke, Lord Mans- "field, Blackstone and Bacon's Abridgement all agree that writs "of habeas corpus have been and may be issued into all parts of "the dominions of the Crown of England, wherever a subject "of the Crown is illegally imprisoned or kept in custody. In "addition to these dicta of eminent authorities, we have actual "precedents of the issue of the writ, in very modern times, into "the Islands of Man, Jersey and St. Helena. Inasmuch, there- "fore, as the power of this court thus to issue the writ has been "not merely asserted as matter of doctrine, but carried into "effect in practice; and as the writ has issued even into domi- "nions of the Crown in which there is an independent local "judicature; we think that nothing short of legislative enactment "would justify us in refusing to exercise the jurisdiction, when "called upon to do so for the protection of the personal liberty "of the subject."

In the last-mentioned case the court was confronted for the first time with the situation that there were in the dominions in question competent courts having jurisdiction to issue the writ and this clearly caused the court to question whether they had any jurisdiction in the matter despite what appeared in the quoted authorities. The application, however, came before the court as an ex parte application. Further, it was necessary to act immediately, and the court issued the writ in order that the matter might be fully argued on the return. What in fact happened thereafter we do not know.

In subsequent cases some of the judges who had sat in *Anderson's* case[6] referred to the special circumstances of that case. Thus, in *In re Mansergh*[7] Cockburn C.J., in the course of the argument, said [8] that Lord Mansfield's statement that prerogative writs "may issue to every dominion of the Crown "of England" must be taken with considerable qualification.

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[4] (1861) 3 E. & E. 487.

[5] Ibid. 494.

[6] 3 E. & E. 487.

[7] (1861) 1 B. & S. 400.

Again, Crompton J. said [9]: "In *Ex parte Anderson*,[10] which "has been referred to, application was made for a habeas corpus "to Canada, and precedents were adduced so expressly in point "that, according to the great principle regulating these prerogative writs, the party had a prima facie right to have the "writ issued. Besides, if a habeas corpus is improperly issued, "it may be questioned on the return to the writ. We did not "grant a rule to show cause in that case, because there was "immediate danger to the party. For these reasons that case "must not be taken as an authority that a habeas corpus will "go to a colony. The only other case mentioned was the *St.* "*Helena Case, Ex parte Lees* [11]; but there, after the court had "refused to interfere, a writ of error had been allowed by the "Crown, and the habeas corpus was afterwards issued by a "judge at chambers merely as an ancillary step."

Further, Blackburn J. said [12]: "I have said there is no authority for such a proceeding as this. The nearest is *Ex parte* "*Anderson*,[13] where a habeas corpus was sent to Canada. But "in that case the writ was granted because it was necessary to "act immediately, and it could be afterwards quashed if erroneous, added to which there were some very strong precedents "in favour of granting it. But that cannot be taken as a "decision of this court that we have a control over all jurisdictions beyond seas in countries subject to the British Crown."

Again, in *Ex parte Brown*,[14] Blackburn J. said [15]: "It has "been established by various decisions that the writ of habeas "corpus can issue from this court to the Isle of Man. Whether "it can issue to the colonies abroad has not been expressly "decided; but this court, in a case where life and death were "depending, thought that there was sufficient doubt about the "matter to issue the writ to Upper Canada, leaving the effect of "it to be discussed afterwards. The facts there did not require "that the question should be decided; and immediately after that "case stat. 25 & 26 Vict. c. 20 was passed."

As mentioned in the last-quoted passage, it was as the result of *Ex parte Anderson*[16] that the Habeas Corpus Act, 1862, was passed. The Act was entitled: "An Act respecting the Issue of "Writs of Habeas Corpus out of England into Her Majesty's "Possessions Abroad," and by section 1 it was provided that: "No writ of habeas corpus shall issue out of England, by authority of any judge or court of justice therein, into any colony or "foreign dominion of the Crown where Her Majesty has a lawfully established court or courts of justice having authority to "grant and issue the said writ, and to ensure the due execution "thereof throughout such colony or dominion."

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[8] 1 B. & S. 400, 404.

[9] Ibid. 409.

[10] 3 E. & E. 487.

[11] (1858) E.B. & E. 828.

[12] 1 B. & S. 400, 411.

[13] 3 E. & E. 487.

[14] (1864) 5 B. & S. 280.

[15] Ibid. 294.

It is, we think, clear that the expression "foreign dominion "of the Crown" in that Act does not mean a foreign territory over which the Sovereign exercises dominion in the sense of power, but is referring to the territorial dominions of the Sovereign overseas.

It is true that on this construction it is not altogether easy to see what the distinction is between a colony and a foreign dominion of the Crown, and, indeed, this was referred to by Cockburn C.J. in *Ex parte Brown.*[17] *Rex* v. *Earl of Crewe, Ex parte Sekgome*,[18] a decision of the Court of Appeal, is, moreover, clear and binding authority as to the correctness of this construction, and the respondents do not seek to dispute that decision.

Pausing there, we should have thought that it was implicit in the Act of 1862 that it was not then thought that the writ would issue to foreign territories although they were in subjection to the Sovereign as opposed to being part of the Sovereign's dominions. True, protectorates were not as common as they later became, but they existed. The Ionian Islands had for long been a protectorate. Parts of India formed protectorates, and in India courts had been set up capable of issuing the writ. It is almost inconceivable that, were it thought that the writ issued to such foreign territories, Parliament would not have dealt with them in the same way as with the Sovereign's territorial dominions.

It is, however, on this case of *Ex parte Sekgome*[18] that the applicant principally relies. Sekgome claimed to be the Chief of a native tribe in the Bechuanaland Protectorate. By a proclamation made by the High Commissioner he was detained in custody in the protectorate on the ground that such detention was necessary for the preservation of peace within the protectorate. That proclamation was made pursuant to powers conferred by an Order in Council which was expressed to have been made "in exercise "of the powers by the Foreign Jurisdiction Act, 1890, or other-"wise in Her Majesty vested." The application for the writ was directed only to His Majesty's Secretary of State for the Colonies, the ground being that the proclamation was not validly made under the powers conferred by the Order in Council.

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[16] 3 E. & E. 487.

[17] 5 B. & S. 280, 290.

[18] [1910] 2 K.B. 576; 26 T.L.R. 439.

The Divisional Court discharged the rule nisi on two grounds: (1) that there were courts of law in the protectorate which had jurisdiction to deal with the question of the legality of the detention, and that under section 1 of the Habeas Corpus Act, 1862, the writ ought therefore not to issue; and (2) that the Secretary of State was not the custodian of the body of Sekgome.

In the Court of Appeal the court, consisting of Vaughan Williams, Farwell and Kennedy L.JJ., held that the Divisional Court were wrong in holding that Bechuanaland was a foreign dominion within the Act of 1862, and, further, that the Proclamation was validly made. As we read the case, those were the only two points decided by the Court of Appeal.

In the course of their judgments, however, the Lords Justices made observations on a number of other matters, including the question whether the writ would issue to the protectorate, and also the question whether the Secretary of State was a person having the custody of the body to whom the writ could be issued.

So far as the first question is concerned, Vaughan Williams L.J., after referring to *Ex parte Anderson,*[19] said [20]: "This being "so, I ask myself why, if the writ of habeas can be issued to "the King's territorial dominions, the writ should not be ordered "to go to any country or place under the subjection of the Crown "of England whenever it is suggested to the court in England "that a subject of the Crown is illegally imprisoned. The very "fact that Parliament by the Foreign Jurisdiction Act, 1890, and "the earlier Acts dealing with foreign jurisdiction is party to the "exercise by the King of extra-territorial jurisdiction shows that "the extra-territorial jurisdiction of the King is not a merely "personal jurisdiction. It is the King acting with the concur-"rence of Parliament, and although Cockburn C.J. in *Ex parte* "*Anderson* [21] says,[22] 'These writs of habeas corpus have been "'issued and are to be issued into all the dominions of the Crown "'of England whenever it has been suggested to the court that a "'subject of the Crown is illegally imprisoned or illegally kept

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[19] 3 E. & E. 487.

[20] [1910] 2 K.B. 576, 605.

[21] 3 E. & E. 487.

[22] 30 L.J.Q.B. 129, 132.

"'in custody,' it is by no means clear that the Chief Justice "meant by dominions territorial dominions as distinguished from "dominions where the King with the concurrence of Parliament "exercises jurisdiction and, in that sense, dominion. It is plain "from the case of *Ex parte Anderson*[23] itself, and from the case "of *Carus Wilson*,[24] that the courts in England have not allowed "inconvenience which might arise in giving effect to the writ to "be a ground for refusing to issue it, or been deterred from "ordering the writ to go because of the possibility of disobedience "arising from the mode of possession. In the present case the "King has every means of enforcing obedience. The Crown, with "the concurrence of Parliament, has exercised jurisdiction "throughout the Bechuanaland Protectorate and has appointed "judges and police officers to execute their judgment, and has "established courts which the Crown contends, I think wrongly, "have power to issue a writ of habeas and enforce it; in short, "has established laws which the dwellers in the Protectorate, "whether natives or mere residents, must obey, and from which "they surely must be entitled to receive protection when injured. "Is the mere fact of absence of annexation and theoretical posses-"sion to deprive the Crown and those who are under the law from "the benefits and power of the writ of habeas?"

Then he said[25]: "I am inclined to think that in a case where "the King legislates by proclamation, by virtue of an Act of "Parliament, such as the Foreign Jurisdiction Act, 1890, the "mere fact of the country not having been annexed, and being "extra-territorial, would not prevent the issue by the King's "Bench Division, or the judges of the High Court, of a writ of "habeas to run in a country governed by a system of laws created "under the powers of such an Act of Parliament, especially in a "case where the laws thus created apply to British subjects for "the time being resident in or resorting to the country in "question."

Farwell L.J. observed[26]: "Where a man who owes obedience "to laws imposed by England is imprisoned and kept imprisoned "without trial in a place maintained by England, and placed "under the control of an officer of the Crown who acts under "the orders of the Colonial Office, and who has acted in the "particular case with the assent and approval of and is supported "by the Colonial Office, I should be slow to conclude that the

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[23] 3 E. & E. 487.

[24] (1845) 7 Q.B. 984, 998.

[25] [1910] 2 K.B. 576, 608.

[26] Ibid. 618.

"Secretary of State could not be called on to make a return to "the writ."

As against this, Kennedy L.J., after referring to the affidavit of the Secretary of State in regard to the position of Bechuanaland (very similar in terms to that in the present case), said [27]: "If this be the true view, as, in my opinion, we ought to hold, "and the Bechuanaland Protectorate, including Gaberones, forms "no part of His Majesty's dominions, there is no authority, so "far as I am aware, which would justify the issue of the writ of "habeas corpus for which the appellant asks." While the views expressed by Vaughan Williams and Farwell L.JJ. in the passages quoted are obiter, that of Kennedy L.J. was clearly a ground for his decision (see his reference [28] to "other substantial "grounds" in the last sentence of his judgment).

The applicant naturally relies on these passages from the judgments of Vaughan Williams and Farwell L.JJ., and further relies on the fact, which seems undoubtedly to be true, that neither before the Divisional Court nor before the Court of Appeal was any argument put forward on behalf of the respondent that the writ would not issue in respect of a detention in a protectorate. The Crown only relied on the Act of 1862 and the validity of the Proclamation, and never raised the point now raised in the present case. This was probably for the very good reason that the issue of the writ was not sought to any custodian in the protectorate but only to the Secretary of State. But, in any event, the fact that the point was not taken does not mean that it is a bad point.

It is further to be observed that Vaughan Williams L.J., in forming the view which he expressed, was influenced to some extent by a doubt whether Cockburn C.J. in *Ex parte Anderson* [29] might not have meant by "dominions" not "territorial "dominions" but dominions where the King with the concurrence of Parliament exercises jurisdiction and, in that sense, dominion. We can see no warrant for this. He had read "dominion" in the Act of 1862 as referring to territorial dominions, and we should have thought it was clear that Cockburn C.J. in *Ex parte Anderson*,[30] quoting as he does from Blackstone, Bacon's Abridgement and *Rex* v. *Cowle*,[31] was also referring to dominion in the same sense.

In *In re Ning Yi-Ching* [32] Cassels J. followed the view expressed by Kennedy L.J.[33] in preference to that expressed by the other Lords Justices. In that case four Chinese subjects were detained on criminal charges in the British Concession at Tientsin with a view to their being handed over to the Japanese authorities. The writ was sought to prevent this being done. In the course of his judgment Cassels J., after referring to the view expressed by Kennedy L.J.,[33] is reported in these words[34]: " He had listened " in vain for a case in which the writ of habeas corpus had issued " in respect of a foreigner detained in a part of the world which " was not a part of the King's dominions or realm. In Tientsin " Britain had merely acquired a lease of land and had been " granted by treaty the right to administer justice to its own " subjects. He was compelled to hold that in the circumstances " of the present case the writ could not issue."

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[27] [1910] 2 K.B. 576, 624.

[28] Ibid. 629.

[29] 3 E. & E. 487, 494.

[30] Ibid.

[31] 2 Burr. 834.

[32] (1939) 56 T.L.R. 3.

It is true that the subjects concerned were not British subjects. On the other hand, it is clear that the writ is available to foreign subjects provided their detention is in territory in respect of which the writ will issue. Accordingly, we think that this case is at any rate authority for the proposition that the writ will not issue in respect of a detention in foreign territory.

Finally, reliance was placed by the applicant on *Calvin's Case*.[35] Sir Edward Coke,[36] after referring to the ordinary writs between subjects for debt, trespass, etc., which cannot " by any " means extend into any other kingdom, country, or nation, though " that it be under the King's actual legiance and obedience," went on thus[36]: " But the other kind of writs that are mandatory, " and not remedial, are not tied to any place, but do follow " subjection and legiance, in what country or nation soever the " subject is, as the King's writ to command any of his subjects " residing in any foreign country to return into any of the King's " own dominions."

These are undoubtedly very wide words, but it is only right to point out that the matter in question in no way concerned the issue of a writ of habeas corpus. The passage quoted had reference to a writ out of Chancery under the Great Seal of England to the Mayor of " Burdeaux, a City in Gascoin," then being under the King's obedience, to certify whether one that was outlawed here in England was at that time in the King's service under him " in obsequio Regis."

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[33] [1910] 2 K.B. 576, 624.

[34] 56 T.L.R. 3, 6.

[35] (1609) 7 Co.Rep. 1.

[36] Ibid. 20a.

In this state of the authorities, and having regard to the conflicting views expressed by Vaughan Williams and Farwell L.JJ. on the one hand and Kennedy L.J. on the other, we think that it is necessary to consider the matter by reference to first principles.

The writ of habeas corpus is a prerogative writ, namely, as this court conceives it, a manifestation of the sovereignty of the Crown and an instrument by which that sovereignty is exercised. It follows that there can be no power to issue this writ which is not derived from, or which is more extensive than, such sovereignty. The Crown is not sovereign over the common law but retains only such part of that unqualified plenitude of absolute power which constitutes sovereignty as the common law accords to the Crown. At the same time the prerogative is part of the common law of this country and exists by force and virtue of the law. Therefore, the writ of habeas corpus may lawfully be issued only in cases where the common law or some statute permits or requires the Sovereign to issue it. The Sovereign herself cannot issue the writ otherwise than through this court, which derives any jurisdiction it has from her, and in which, in contemplation of law, she is always present.

The concept of sovereignty of any ruler or state is in its aspect of power essentially related to the *area* throughout which the sovereign power is lawfully exercisable, that is, is exercisable without restraint or hindrance by any competing sovereignty. It is self-evident, in the opinion of the court, that throughout the territorial dominions of the Crown—that is all territory belonging to the Crown, as distinct from territory belonging to any person who is for the time being King or Queen (which if abroad would remain for this purpose "foreign")—the Crown possesses full sovereignty provided that, or to the extent that, the common law has not imposed limitations upon that sovereignty. Thus, by the Coronation Oath the British Sovereign undertakes to "govern the people of the United Kingdom of "Great Britain and Northern Ireland and the Dominions thereto "belonging, according to the Statutes in Parliament agreed on "and the laws and customs of the Realm."

Looked at in this way, the undoubted duty of the Sovereign to protect her subjects, and the undoubted right of the subject to protection, are limited to protection in the Sovereign's dominions.

The alternative view for which the applicant contends involves the proposition that a British subject in say France or the United States of America is entitled to protection by means of the writ of habeas corpus.

Indeed, Mr. Lawson, for the applicant, does not shrink from this, maintaining that the fact that the issue of the writ may be utterly ineffective does not mean that there is no power to issue it. We cannot accede to this argument which involves a trespass on the sovereignty of other countries. Moreover, it is we think inconsistent with the authorities quoted down to and including *Ex parte Anderson,*[37] and we prefer the view expressed by Kennedy L.J. in *Ex parte Sekgome* [38] to that expressed by Vaughan Williams and Farwell L.JJ. Mr. Lawson did suggest that there might be a difference in the case of a foreign territory which was, as here, to all intents and purposes wholly under the subjection of Her Majesty, and a territory where the subjection was only partial. In our view no such distinction can or should be made. It is not for this court to inquire as to the degree of subjection which exists by reason of any treaty, grant, usage or sufferance. Mr. Lawson also contended that provided that the custodian was a Crown servant it mattered not where the body was detained. Again we can see no ground for saying that the writ will issue into foreign territory whenever the gaoler is a Crown servant.

It was for these reasons that the court ruled against the applicant on the preliminary point and dismissed the application against the Governor of Northern Rhodesia and the District Commissioner.

The case then proceeded against the Secretary of State for the Colonies, when for convenience the first point argued was whether the Secretary of State had in the circumstances a sufficient degree of control to constitute him a custodian of the body to whom the writ could issue. The applicant again relied on the case of *Ex parte Sekgome.*[39] In that case, as we have already said, the Divisional Court held that the Secretary of State was not the custodian of the body. Vaughan Williams L.J., while not deciding the matter, expressed some doubt whether this view of the Divisional Court was correct. Thus, he said [40]: "As to the second preliminary objection on which the discharge "of the rule for a habeas was based by the Divisional Court, "namely, that Lord Crewe, to whom the rule nisi is addressed, "has not the custody of the body of Sekgome, I am by no means

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[37] 3 E. & E. 487.

[38] [1910] 2 K.B. 576, 624.

[39] [1910] 2 K.B. 576.

[40] Ibid. 592.

"satisfied, having regard to the statute 16 Car. 1, c. 10, ss. 6 "and 8, that a writ of habeas must necessarily be addressed to "the governor of the gaol or gaoler or other the official in command of the gaol, and in that sense having the actual custody "of the imprisoned person claiming to be entitled to the protection of the writ of habeas corpus. I am disposed rather to "say that the writ may be addressed to any person who has such "control over the imprisonment that he could order the release "of the prisoner."

Again, Farwell L.J. said[41]: "I must not, however, be "taken to assent to the view . . . that the Secretary of State "would not be the proper person to make a return to a writ of "habeas corpus if there had been no proclamation of December "5, 1906." Further down he says[41]: "I should be slow to "conclude that the Secretary of State could not be called on to "make a return to the writ."

Kennedy L.J., however, expressed a contrary view where he said[42]: "I am of opinion that the Secretary of State for "the Colonies is not a person to whom such a writ can properly be directed. It appears to me that, in the case of the "executive or administrative superior of the actual custodian "of the person in detention who applies for a writ of habeas "corpus, it may be right and proper that the writ, if issued, "should be directed to him either with or without the inclusion "of the actual custodian, if that executive or administrative "superior is a person whose authority the custodian must rely "upon in order to justify the detention, and to whom obedience "must be rendered by the custodian, if he orders a release. I "am inclined to think that the High Commissioner, who is the "chief executive and administrative official of the territory, is "a person to whom in this present case the writ might properly "have been directed. But I know of no authority, and certainly I can find no guidance of principle, to justify the "appellant's contention that a writ of habeas corpus in this "case can properly be directed to His Majesty's Secretary of "State for the Colonies, on the ground that, if it approves itself "to his conscience and judgment, it is his duty to advise His "Majesty himself to give, or to authorise a Secretary of State "to give, instructions to the High Commissioner to withdraw "the Proclamation of December 5, 1906, and to order Sekgome's "release from detention under that proclamation."

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[41] [1910] 2 K.B. 576, 618.

[42] Ibid. 629.

In *In re Ning Yi-Ching*[43] Cassels J. again preferred the view of Kennedy L.J. He is reported in these words[44]: "It had "further been contended that the writ could not issue to Lord "Halifax because he was not in control of the prisoners but was "only acting in an advisory capacity. In his view that con-"tention was well founded, although it did not follow that he "thought that in a proper case the writ would not issue against "a Secretary of State."

Reliance was further placed by the applicant on *Barnardo* v. *Ford*,[45] and *Rex* v. *Secretary of State for Home Affairs, Ex parte O'Brien.*[46] Both those cases are authority for the proposition that the writ will issue not only to the actual gaoler but to a person who has power or control over the body. Further, in *O'Brien's* case[46] the writ was issued to the Secretary of State for Home Affairs, who had in fact handed the physical custody of the body over to the Government of the Irish Free State. It is clear, however, from the facts of that case, that the Secretary of State had not only been responsible for the original detention but that there were strong grounds for thinking that in handing over the body to the Government of the Irish Free State he had not lost all control over it. In those circumstances the court decided to issue the writ in order that the full facts could be investigated and argument heard on the return.

The position here is quite different. The restriction orders under which the applicant is detained were not made by the Secretary of State. His approval or consent was not required and there is no evidence that he took any part in the detention. No doubt the writ will issue not only to a person who has the actual custody but also to a person who has the constructive custody in the sense of having power and control over the body. Here, however, we can find no custody by the Secretary of State in any form.

We were referred to a number of provisions in the constitution of, and in other legislation in regard to, Northern Rhodesia under which the Secretary of State is specifically given certain powers, and powers which extend beyond advice. But we find it impossible to say that as a result of those powers he can be said to have the custody of the body in any sense. Apart from the powers given by such legislation the only powers of the Secretary of State arise by reason of his constitutional position under which he advises Her Majesty. The fact, however, that he can advise and attempt to persuade Her Majesty to cause the body to be brought up does not mean that he has such a control as will enable the writ to issue. Nor is it in our view relevant that if the writ were issued the Secretary of State might well feel it proper to influence the production of the body. Accordingly, while agreeing that there may be special circumstances in which a Secretary of State is amenable to the writ, we can find nothing in the facts of this case which would justify us in calling upon him to produce the body. That being so, we intimated our decision to that effect and this made it unnecessary to proceed further with the case.

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[43] 56 T.L.R. 3.

[44] Ibid. 6.

[45] [1892] A.C. 326; 8 T.L.R. 728.

[46] [1923] 2 K.B. 361; [1923] A.C. 603.

Finally, we should mention another point that was raised, namely, that even if the Secretary of State could be regarded as the custodian of the body the writ would not issue to a custodian in this country where the original and present detention was, as in the present case, in a foreign territory. There may be some substance in the submission that the phrase "issue "the writ into . . ." properly means, as seems to have been assumed in *Sekgome's* case,[47] "issue the writ in respect of a "detention in. . . ." Having regard to the views expressed above, it is unnecessary to come to a decision on this point. We only mention it in order to state that nothing that we have said should be read as expressing the view that if, for instance, the Governor or the District Commissioner paid a visit to this country he would be amenable to the writ in respect of the detention complained of, merely by reason of his physical presence here.

Application dismissed with costs.

J. F. L.

Mwenya appealed. The grounds of his appeal were that the court was wrong in law in holding (1) that he had not made out a prima facie case against the Secretary of State for the Colonies showing that he had sufficient control over the appellant for the writ to issue, and (2) that there was no jurisdiction to give leave to issue the writ against the Governor of Northern Rhodesia and the District Commissioner.

The second ground of appeal alone was argued before the Court of Appeal.

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[47] [1910] 2 K.B. 576.

John Foster Q.C., *Neil Lawson Q.C.* and *Bryan Anns* for the applicant. The Divisional Court refused the application for a writ of habeas corpus as against the Governor of Northern Rhodesia and the District Commissioner on the ground that the writ did not issue to a protectorate. The application was refused as against the Secretary of State on the ground that there was no prima facie case that he had the custody of the applicant. Since the applicant has not been charged with or convicted of a criminal offence, this is not a criminal cause or matter. Hence there is a right of appeal to this court.

The regulations relating to the applicant's detention were made under Orders in Council under the Foreign Jurisdiction Act, 1890, which were invalid. Their invalidity arises from the fact that they were not published in the London Gazette pursuant to the provisions of the Rules Publication Act, 1893. At the time that the Orders in Council were made, the Act of 1893 applied, and, accordingly, the applicant's detention is unlawful.

For the purpose of argument on the preliminary point the Crown concedes that the applicant is a British subject and that the orders in question were invalid. As the result of *Ex parte Anderson*,[1] where the court gave leave for a writ of habeas corpus to issue to Canada, Parliament enacted the Habeas Corpus Act, 1862, which provides that a writ should not issue to any colony or foreign dominion of the Crown where there has been established by the Crown courts with authority to grant writs of habeas corpus. That Act was considered in *Rex* v. *Earl of Crewe, Ex parte Sekgome*,[2] where the applicant, a British subject residing in Bechuanaland, was detained by virtue of a proclamation. It was held by the Court of Appeal that his detention was lawful. The Divisional Court discharged the rule on two grounds, first, that there were competent courts established in Bechuanaland to issue the writ under the Act of 1862, and, secondly, that the Secretary of State, against whom the application was made, had not sufficient custody of the applicant. That decision of the Divisional Court implies that a writ issues to a protectorate. Otherwise the Act of 1862 was irrelevant.

The reasoning of Vaughan Williams L.J. in the *Sekgome* case [2] was that in any area where the Crown exercises sovereignty, so that it can be said to be under the dominion of the Crown, there was jurisdiction to issue a writ. His judgment is especially relied on where he says[3]: "I have come to the conclusion that "this Act"—the Act of 1862—"has no effect in the Protectorate "as preventing the issue into the Protectorate of a writ of habeas, "because as I construe the Act, it applies only to the territorial "dominions of the Crown. . . . In *Ex parte Anderson*[4] no doubt "seems to have been entertained as to the power of the Court "at Westminster to issue a writ of habeas to go to any place "under the subjection of the Crown of England whenever it is "suggested to the Court that a subject of the Crown is illegally "imprisoned. . . .

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[1] (1861) 3 E. & E. 487; 30 L.J. Q.B. 129.

[2] [1910] 2 K.B. 576; 26 T.L.R. 439.

"I am inclined to think that in a case where the King legis- "lates by proclamation, by virtue of an Act of Parliament, such "as the Foreign Jurisdiction Act, 1890, the mere fact of the "country not having been annexed, and being extraterritorial, "would not prevent the issue by the King's Bench Division, or "the judges of the High Court, of a writ of habeas to run in a "country governed by a system of laws created under the powers "of such an Act of Parliament. . . ."

Vaughan Williams L.J. was clearly dealing with the point under consideration; in his view it made no difference to the issue of a writ of habeas that the area was not within the territorial dominions of the Crown. Farwell L.J. did not express a view on this point, but Kennedy L.J. considered that the writ could not issue to a protectorate. On this point, therefore, the judgments did not proceed on the same lines.

The Habeas Corpus Act, 1862, does not apply to this case. In Northern Rhodesia there is no other sovereign than Her Majesty. The Foreign Jurisdiction Act, 1890, does not extend the Crown's jurisdiction; it provides for its exercise. It is hoped to satisfy the court that sovereignty is divisible. It appears from the decision in *North Charterland Exploration Co. (1910) Ltd.* v. *The King*[5] that Northern Rhodesia is in the fullest subjection to the Crown. Every aspect of government is under the control of the Crown and such control is not divided with any other person. The Divisional Court was wrong in holding that sovereignty is indivisible. The respondents cannot get any oblique help from the Habeas Corpus Act, 1862. When that Act was passed the modern type of protectorate did not exist. It appears from the decision in *Ex parte Anderson*[6] that the writ will issue to places outside this country. *In re Ning Yi-Ching*[7] shows that the Crown's jurisdiction over protectorates arises by virtue of the prerogative. The writ of habeas corpus is a prerogative writ and, if the Crown has power to establish courts, it has also power to issue the writ.

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[3] [1910] 2 K.B. 576, 591, 608.

[4] 3 E. & E. 487.

[5] [1931] 1 Ch. 169; 46 T.L.R. 566.

[6] 3 E. & E. 487.

[7] (1939) 56 T.L.R. 3.

[*J. R. Cumming-Bruce* for the Secretary of State for the Colonies. The question is whether, where the Crown exercises jurisdiction in a foreign country, that confers on the Queen's Bench Division jurisdiction to issue a writ of habeas corpus to operate in such foreign country.]

John Foster Q.C. continuing. The Attorney-General's case is based on the argument that a writ of habeas corpus does not issue to a protectorate. This is the preliminary issue. If it is held that it may issue, the merits of the case will have to be considered. The preliminary concessions have only been made for the purpose of enabling the preliminary point to be considered.

In W. E. Hall's book (1894) on the Foreign Jurisdiction of the British Crown (pp. 195, 223, 224, 226), he points out that the inhabitants of a protectorate are not British subjects but, if it is annexed, they are. That is not a material factor. He states that there are two kinds of sovereignty: internal sovereignty and external sovereignty. Section 1 of the Foreign Jurisdiction Act, 1890, was not necessary to confer jurisdiction on the Crown in a foreign country but provided for the manner of its exercise. Sovereignty does not depend on territorial sovereignty. It may be divided. The Crown in fact exercises entire sovereignty over Northern Rhodesia subject only to a negligible power elsewhere.

The applicant wishes to show that there is no such confusion in the authorities as the judgment of the Divisional Court suggests; *Calvin's Case* [8] was not confined only to the particular writ of outlawry. The observations in the judgment [9] apply to mandatory writs in general. Such writs run where there is jurisdiction and control: *Ex parte Wyatt* [10]; *In re Ning Yi-Ching.* [11] In *Rex* v. *Cowle* [12] Lord Mansfield did not consider that the fact that there had been no formal act of annexation mattered. In the eighteenth and nineteenth centuries it was not possible to draw a clear line between territories which had been annexed and those which had not. *Ex parte Wyatt* [13] shows that it was thought that where a party was in France the writ could be served there. It is not suggested that that decision was right, but it was not then argued that the issue of the writ was confined to colonies and dominions. *In re Pinckney*[14] is only authority for the proposition that the writ will not be served out of the jurisdiction. In *Ex parte Brown*[15] it was held that the writ issued to the Isle of Man after the Act of 1862 had been passed. Plantations until they become colonies were in the same position as protectorates.

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[8] (1609) 7 Co.Rep. 1.

[9] Ibid. 20a.

[10] (1836) 5 Dowl. 389.

[11] 56 T.L.R. 3.

[12] (1759) 2 Burr. 834.

[13] 5 Dowl. 389.

The status of Northern Rhodesia approximates to that of a colony. It is possible for an inhabitant to become a British subject. In the Rhodesia and Nyasaland Federation Act, 1953, Northern Rhodesia is described as under the protection of Her Majesty. That closes the applicant's argument on the preliminary question whether the court has jurisdiction to issue the writ.

Sir Reginald Manningham-Buller Q.C., A.-G., and *J. R. Cumming-Bruce* for the Secretary of State for the Colonies.

J. R. Cumming-Bruce opened the case for the Secretary of State for the Colonies in the absence of the Attorney-General. The Crown is interested in the liberty of persons under its protection wherever they may be. The question is whether the Crown in the Courts of Westminster had jurisdiction over the whole world where there was a certain degree of subjection and allegiance. The Crown's contention is that the jurisdiction of the English courts has some territorial limits. It does not advance and recede with the changing facts in overseas territories. If that were so, the court would have to inquire, before issuing a writ, into the facts and whether such a degree of de facto subjection had been proved as to constitute a condition precedent to the exercise of the jurisdiction.

The writ of habeas corpus is a prerogative writ in relation to jurisdiction and is not materially different from the other prerogative writs of certiorari and mandamus. If the court has jurisdiction in respect of the various countries which have become associated with the Crown and over which the Crown exercises a certain degree of authority, it would follow that the Court of Westminster could issue the writs of certiorari or mandamus in such territories. Such jurisdiction has never been exercised.

There are practical differences between colonies and protectorates. In a protectorate the rule is indirect; the Crown acts by Order in Council and proclamation. The Crown in the exercise of its prerogative contemplates the establishment in Northern

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[14] [1904] 2 K.B. 84; 20 T.L.R. 363.

[15] (1864) 5 B. & S. 280.

Rhodesia of courts having jurisdiction to issue writs of habeas corpus. There is no need to rely on any extension of the jurisdiction of this court to protect persons in distant lands. If the test of jurisdiction does not depend on whether the territory in question is a colony or a protectorate, it would be necessary to have an inquiry as to the facts.

The appellant's proposition is that where there is no court able to issue a writ of habeas corpus, then the English court can do so. *Ex parte Anderson* [16] is no authority for that proposition. There the writ was issued to Canada, a colony.

In constitutional law the reference to the writ of habeas corpus is a reference to the internal government of the territories. In no authority is there any reference to the issue of the writ into a foreign country nor to any inquiry as to the degree of authority of the Crown in any territory to ascertain whether the writ would issue. The Habeas Corpus Act, 1862, did not confer jurisdiction; it cuts down jurisdiction which may have existed before.

The question may be whether the part of the federation which was a colony and the two protectorates will become something different as a result of the Emergency (Transitional Provisions) Ordinance, 1956, constituting the federation. There is nothing in the scheme of the federation from which the court can infer that a new jurisdiction is conferred. Section 13 of that Order made thereunder does not add anything to the inferences to be drawn from the Act of 1862. If in 1862 a writ could not issue into a protectorate, it cannot issue today.

Looking at the history of the authorities, it appears that there has been no occasion on which a prerogative writ has issued out of this country into a protectorate or into a colony. The comments on *Ex parte Anderson* [16] in *In re Mansergh* [17] show this. The fact that the writ has issued to Berwick or to the Isle of Man is immaterial, since both are integral parts of England. The common law jurisdiction is not so plastic that it can be extended without the consent of Parliament. The test is territorial sovereignty and there is no other.

To ascertain the places to which the writ will issue, it is necessary to look at the authorities. In the textbooks it has been stated that the writ will issue to the plantations and the colonies. In fact there is no case in which it has issued to a colony. Lord Mansfield refers to the writ issuing to places under the subjection of the Crown. That was not what the court was being asked to do in that case. The intention of the Act of 1862 was to prevent the issue of writs from England in all circumstances. Parliament had not then in mind any question of jurisdiction in respect of any foreign country. The troubling aspect of the applicant's argument is the contention that the Crown can, by the issue of an Order in Council bringing about a certain degree of subjection to the Crown, extend the jurisdiction of the court. That does not seem a legitimate or possible mode of extending the jurisdiction.

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[16] 3 E. & E. 487.

[17] (1861) 1 B. & S. 400.

In *Rex* v. *Cowle* [18] the question was whether Berwick was part of the realm of England. The phrase "in subjection to "the Crown" had not such a precise meaning in the eighteenth century. *Ex parte Anderson* [19] is authority for the prima facie issue of the writ. The question was not there finally decided. It is only occasionally mentioned in the books on the issue of a writ into a colony.

It may be that in the case of a protectorate rights possessed by treaty would prevent the issue of a writ. The pattern in different protectorates varies greatly. There is no evidence of any inquiry into this question: *Ex parte Sekgome*.[20]

Sir Reginald Manningham-Buller Q.C., A.-G., continuing for the Crown. It was thought that it was the Crown's duty to take the point of jurisdiction in order to have it decided aye or nay whether this court had jurisdiction. No concessions have been made nor is the court asked to proceed on any hypothesis. Apart from the Act of 1862, the jurisdiction of the Queen's Bench Division does not vary with the rights of the Crown in other countries. If this contention of the applicant is right, the Queen's Bench Division can issue writs of habeas corpus to all protected territories. In every case, if that argument is right, it would be necessary to consider the precise degree of power and jurisdiction exercised by the Crown in the protectorate. That would not be desirable. This is not an academic question. "Sovereignty" is used in many senses. There may be cases where the Crown is regarded as sovereign for purposes of international law but not as regards the internal affairs of the territory in question. The Minister has certified that this is a foreign territory. That certificate is conclusive under the Foreign Jurisdiction Act, 1890. The words "power and jurisdiction" are used deliberately in that Act. There is no reference to sovereignty. The difference between protectorates on the one hand and dominions and colonies on the other is that protectorates are always foreign territory. The court is asked to say that the writ of habeas corpus cannot issue into a foreign territory and that there has never been such a power.

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[18] 2 Burr. 834.

[19] 3 E. & E. 487.

[20] [1910] 2 K.B. 576.

The fact that the common law applies to a territory does not mean that the Queen's Bench Division also has jurisdiction there. Whether Her Majesty could enlarge the court's jurisdiction or not is immaterial. She has not done so in fact. It is a fallacy to suggest that sovereignty is synonymous with jurisdiction. The *Anderson* case [21] is the highwater mark of the jurisdiction. It is no authority for the proposition that the writ can issue to a foreign country. The writ was there issued in Canada, an external possession belonging to the Crown. It would be wrong for the court now to extend its jurisdiction.

If Northern Rhodesia is a foreign country, it makes no difference in principle whether Her Majesty exercises powers and jurisdiction over it or not. This court is not concerned with their extent.

The writ was originally limited to England. Subsequently the jurisdiction was extended to territory which belonged to the Crown of England. It never applied to Scotland. The court can only operate in the area of its jurisdiction. That area is not coterminous with the area of British sovereignty. Her Majesty could under the Act of 1890 confer jurisdiction on the local courts to issue the writ, but it is not suggested that she could confer jurisdiction on the Queen's Bench Division to issue the writ where it has not got jurisdiction to do so now. Having regard to the limits today on the prerogative, it is doubtful whether the area in which the exercise of a prerogative writ can issue could be enlarged. The jurisdiction of the Court of Queen's Bench was recognised at common law. Her Majesty could not alter that jurisdiction by the exercise of the prerogative, since by doing so she would be altering the common law. A statute would be required to do that. However much it may be desirable that the Queen's Bench Division should have jurisdiction over a protectorate, it is submitted that in fact it has no such jurisdiction.

B. J. M. MacKenna Q.C. and *J. G. Le Quesne* for the Governor of Northern Rhodesia and the District Commissioner of the Mporokoso District. It has been suggested that the language of Lord Mansfield in *Rex* v. *Cowle* [22] is inconsistent with the

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[21] 3 E. & E. 487.

[22] 2 Burr. 834, 856.

Crown's contention. What he meant appears from the earlier passage of his judgment. He was referring to Jersey and Guernsey which, with the other places cited, were territorial dominions of the Crown. Blackstone, vol. 1, sect. 4, pp. 85, 93, 108, 110, when referring to dominions, meant territorial dominions. The question in *Calvin's Case*[23] is distinct from that in the present case. The jurisdiction of the Queen's Bench Division today is that of the courts in 1873. It is not accepted that in 1873 the courts had jurisdiction to issue the writ to a colony.

Neil Lawson Q.C. in reply. The British Nationality Act, 1958, refers to the protectorate. The local writs are issued in the name of the Queen. A decision in relation to this application would have no effect in the case of other protectorates. In each case there would have to be an inquiry as to the facts. In the case of some protectorates the whole internal affairs are under the control of the local sovereign. In the case of Northern Rhodesia Her Majesty exercises full sovereignty. There is no other competing sovereignty.

Another approach to this matter is that the remedy should be available to those who owe obedience to the Crown. The applicant is a British subject. If the court is satisfied that the writ can issue, the question whether the applicant's detention is lawful can be argued on the return of the writ.

Cur. adv. vult.

October 13. The following judgments were read.

LORD EVERSHED M.R. This was an application to the Divisional Court of the Queen's Bench Division for an order of habeas corpus on the part of one Andrew Mwenya, a native inhabitant of Northern Rhodesia.

The respondents to the application are the Secretary of State for the Colonies, the Governor of Northern Rhodesia and the District Commissioner for the district in which Mwenya (as he alleges) is "detained." The facts of the case (which are somewhat limited in the evidence so far before us) and the allegations on both sides are fully set out in the judgment of the Divisional Court. As appears therefrom Mwenya is restricted by certain orders from moving out of an area said to be 1,500 square miles in extent, but which we were informed might be considerably greater. Within that area it seems that Mwenya is not subject to anything in the nature of detention or limitation of his movements.

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[23] 7 Co.Rep. 1.

In substance Mwenya complains that he is a British subject. and has by certain orders referred to, purporting to have been made by the Governor of Northern Rhodesia, been unlawfully "detained" in the district in question, and that he is, accordingly, entitled to invoke the jurisdiction of the Queen's Court here to make an order of habeas corpus directed to one or more of the respondents to his application.

For reasons stated in the judgment of the Divisional Court, which I do not find it necessary to repeat, Mwenya alleges that the orders mentioned were invalidly made: he also alleges that the Order in Council establishing competent courts in Northern Rhodesia (to which application for habeas corpus could or might otherwise have been made) is also for similar reasons invalid.

The respondents by way of answer (we understand) deny the invalidity of any of the orders impugned (including the orders for Mwenya's detention or restriction). They also do not admit: (1) that Mwenya is a British subject, or (2) that Mwenya's "confinement" was detention of such a nature as would, in any event, entitle him to apply for an order of habeas corpus. The Secretary of State also contends that, in any case, his "control" over Mwenya (if any) is not such as makes him a custodian of his body for the purpose of habeas corpus.

But in addition to the above answers, the respondents submitted before the Divisional Court that no writ or order of habeas corpus could be directed to, or in relation to detention in, a British "protectorate" (as distinct from territory which is a colony or part of Her Majesty's "foreign dominions" properly so called). It is conceded on all hands—and proved by the Secretary of State's affidavit—that Northern Rhodesia is a "protectorate" and not either a colony or a "foreign "dominion" of Her Majesty as that last-mentioned phrase is strictly understood.

Before the Divisional Court this last submission was treated as a preliminary objection to Mwenya's application, and that court decided it adversely to the applicant. The Divisional Court also held that Mwenya was not, in any event, in the "custody" of the Secretary of State. The reserved judgment of the Divisional Court is dated July 3. The court expressed no view upon any of the other questions above mentioned—i.e., upon what might be called particular facts or "merits" of the case—but proceeded on certain "assumptions" which were expressed in the judgment as follows[1]: "(1) that the applicant was a British "subject; (2) that the said Orders in Council were invalid and "that so, too, were other Orders in Council in regard to Northern "Rhodesia, including that setting up a High Court having the "power to issue the writ of habeas corpus; and (3) that the "applicant's confinement was of such a nature as to enable him, "if he had been confined in this country, to apply for the writ."

From that decision Mwenya has appealed, and, as a result of the application before us on July 20, we expedited the hearing (since it related to the liberty of the subject or assumed subject). We heard arguments on July 24, 27, 28 and 29.

The argument before us was confined to the preliminary point above mentioned: I do not therefore in this judgment go into the further question whether the Secretary of State has such a control over the alleged detention of Mwenya as would, in any case, justify an order being made against him.

In the course of the argument on the first three days I expressed uneasiness at dealing with a matter of this kind on the basis of a number of hypotheses set forth in the passage of the judgment of the Divisional Court above set out. I must not be taken to be criticising the Divisional Court or the parties who invited the Divisional Court to deal separately with the "preliminary objection." But as things have turned out, I confess my uneasiness has remained. This is a case affecting the liberty of one who alleges that he is a British subject illegally detained. The "preliminary point" turns out to be one involving a constitutional question of very considerable difficulty on which (like the Divisional Court) we have found it necessary to reserve judgment, so that it was impossible for us to express our view before the long vacation. No doubt if we shared the view of the Divisional Court, it would be the end of the matter (subject to an appeal to the House of Lords). But if we take a different view, it is by no means the end of the case, since there then remain many vital questions to be determined, including particularly: (1) Do the orders of which he complains constitute such a "detention" as would entitle Mwenya in any event to apply for an order of habeas corpus? In other words, is there in any relevant sense anyone who can be called a "jailer" of Mwenya, or who is otherwise controlling or detaining his body? (2) Are there courts established in Northern Rhodesia competent to make orders of habeas corpus and, if so, is the effect of the Rhodesia and Nyasaland Federation Act, 1953, and the Emergency (Transitional Provisions) Ordinance, 1956, the Order in Council made thereunder, and particularly section 13 (2) of that order, to exclude any right or power of the Queen's Bench Court here to make the order asked? Upon all these questions an answer favourable to Mwenya has been assumed for the purposes of arguing the preliminary point. Yet they are questions essential to the application, and the Divisional Court has expressed no view upon them, as it has also expressed no finding on the nature and extent of the power, jurisdiction or sovereignty (whichever be the right word) exercised by the Crown in regard to Northern Rhodesia as a so-called "protectorate." Nor have we had our attention directed to any evidence upon any of these matters.

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[1] Ante, p. 266.

As I shall later observe, there is in the evidence before us no detail whatever as to the nature of the Northern Rhodesia Protectorate, in the sense that it does not appear at all what were the treaties or other arrangements made or with whom, nor does it appear what is, in fact, the extent of the power or jurisdiction internally exercised in Northern Rhodesia by or on behalf of the Crown, or the Crown and Parliament.

The Attorney-General repudiated the suggestion that he was inviting the court to deal with the application on a basis of hypotheses. His point was and is the simple one, that is to say, that the Court of Queen's Bench in England has, in any case, no power or jurisdiction to direct a writ or order of habeas corpus to a protectorate, and he submitted that such submission was a proper and legitimate one to take by way of preliminary objection.

I repeat that I am not to be taken as criticising anyone, but repeat also that I am uneasy about the consequence; and in case the matter goes to the House of Lords, I have felt it right to give expression to my uneasiness. It may be that no one can complain of any injustice founded on delay. But the fact is that the question raised by the preliminary point is one of considerable difficulty and complexity. Further, the difficulty is much enhanced by the circumstance that (as appears from cases) the word "protectorate" is not one of recognised or precise meaning. It follows that since we have not gone into, or been invited to go into (and have, of course, no decision upon), the constitutional relationship between Northern Rhodesia and the Crown, or upon the extent of the exercise by the Crown—or of the Crown and Parliament—of "power," "jurisdiction," "dominion" or "sovereignty" (whichever be the appropriate word) in Northern Rhodesia, we are left to decide what, in some degree at least, must be a general and academic question, namely: Has the court here any jurisdiction to make an order of habeas corpus directed to any territory other than territories strictly described as colonies or foreign dominions (as that phrase is understood, for example, in the Habeas Corpus Act, 1862)? And the Attorney-General, in the course of his argument, seemed to me to concede that he wished to avail himself of the present case to get a decision upon this important but general question.

Having said so much, for reasons which I hope will be self-evident, and which may (I also hope) explain and excuse any delay that may occur before the present case is finally determined, I turn to the question as formulated by the Attorney-General.

The history of the prerogative writ of habeas corpus is traced in Sir William Holdsworth's History of the English Law, vol. 9, pp. 108–125. Whatever its origin, it appears to have served procedural uses in the Court of King's Bench from the time of King Edward I, but was eventually extended and developed so that it came "to be the most efficient protection ever invented "for the liberty of the subject." During the time of Sir Edward Coke and the ensuing struggle between Parliament and the common law on the one hand, and the sovereign on the other, its use was proclaimed to be in conformity with the principle of Magna Carta, and its purpose to prevent or redress the use of arbitrary power. No doubt its scope was ordinarily exercised within the realm; but it seems clear that at this time it was not regarded as limited to England. So much, indeed, was not doubted in the argument, and is shown by the judgment of the Divisional Court and the extensive citations made in that judgment.[2] I do not repeat in full those citations; it is clearly stated in the quotation from Bacon's Abridgement and the Commentaries of Sir William Blackstone (and in almost identical language) that the writ (of habeas corpus) runs into all parts of the King's dominions: "for the King is at all times entitled to have "an account why the liberty of any of his subjects is restrained "wherever that restraint be inflicted" (Blackstone, 1768, vol. 3, p. 131). The Divisional Court proceeded to refer also to the passages from Lord Mansfield C.J. in *Rex* v. *Cowle*,[3] on which Mwenya much relied, including particularly the sentence: "There

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[2] Ante, p. 267 et seq.

[3] (1759) 2 Burr. 834, 853, 854, 855, 856.

"is no doubt as to the power of the court; where the place is "under the subjection of the Crown of England." To these citations I add also the cited passage from Sir Edward Coke's report in *Calvin's Case*,[4] also much relied upon by Mwenya: "But the other kind of writs that are mandatory and not "remedial, are not tied to any place, but do follow subjection and "ligeance in what country or nation soever the subject is. . . ."

These passages from Bacon, Blackstone, Lord Mansfield and Sir Edward Coke were the basis of the decision of Cockburn C.J. in *Ex parte Anderson*[5] that the writ of habeas corpus might be issued to "all parts of the dominions of the Crown of "England"; though it was particularly the judgment of Lord Mansfield, in a passage immediately following that already quoted, which laid it down that it was otherwise in the case of[6] "foreign dominions which belong to a prince who succeeds to "the throne of England"—for example, the electorate of Hanover.

The judgment in *Ex parte Anderson*[7] is, to my mind, historically at any rate, of considerable importance, and it was cited by both Vaughan Williams L.J. and Kennedy L.J. in this court in *Ex parte Sekgome*.[8] In the circumstances, I think it right to repeat in this judgment the passage from Cockburn C.J.'s judgment (being substantially the whole of it) cited in the Divisional Court. It is as follows[9]: "Nevertheless, it is to be "observed that, in establishing a local judicature in Canada, "our Legislature has not gone so far as expressly to abrogate "the right of the superior courts at Westminster to issue the "writ of habeas corpus to that province; which writ, in the "absence of any prohibitive enactment, goes to all parts of "the Queen's dominions. Lord Coke, Lord Mansfield, Black-"stone and Bacon's Abridgement all agree that writs of habeas "corpus have been and may be issued into all parts of the "dominions of the Crown of England, wherever a subject of "the Crown is illegally imprisoned or kept in custody. In addition "to these dicta of eminent authorities, we have actual precedents "of the issue of the writ, in very modern times, into the Islands "of Man, Jersey and St. Helena. Inasmuch, therefore, as the "power of this court thus to issue the writ has been not merely "asserted as matter of doctrine, but carried into effect in practice;

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[4] (1609) 7 Co.Rep. 1, 20a.

[5] (1861) 3 E. & E. 487.

[6] 2 Burr. 834, 856.

[7] 3 E. & E. 487.

[8] [1910] 2 K.B. 576; 26 T.L.R. 439.

[9] 3 E. & E. 487, 494.

" and as the writ has issued even into dominions of the Crown " in which there is an independent local judicature; we think that " nothing short of legislative enactment would justify us in refusing to exercise the jurisdiction, when called upon to do so for " the protection of the personal liberty of the subject."

It is, no doubt, true that none of those very learned men, not Bacon nor Blackstone nor Sir Edward Coke nor Lord Mansfield, was addressing his mind to the problem which is now raised before us. It is also true, as pointed out in the judgment of the Divisional Court, that the decision in *Ex parte Anderson* [9] may be said to have been subjected later to some measure of qualification. Yet it must, in my judgment, be taken as clear that at least from the date of *Ex parte Anderson* [9] the writ of habeas corpus was (apart from any statutory restriction) treated as running in any part of the colonies or dominions of the Crown properly and strictly so called. It is so stated in Holdsworth (vol. 9, p. 124): " It was a well established principle that, though " the writ could not issue into the foreign dominion of a prince " who succeeded to the throne of England and therefore not " into Scotland or Hanover, it could issue into any other part " of the King's dominions. It was held, therefore, in 1861 in " *Ex parte Anderson* [9] that it could issue into Canada. . . ." Moreover, the terms of the Habeas Corpus Act, 1862, appear to be a statutory acknowledgment of that principle.

So far, I do not think that I am expressing any view different from that entertained by the Divisional Court; for that court, if it indicated some doubt as to the validity and basis of Cockburn C.J.'s decison, acknowledged, as I understand it, that (apart from the effect of the Act of 1862) the writ would issue to any part of the Queen's dominions properly so called. The question remains, is its scope limited at most to those territories? And it was the view of the Divisional Court that the terms of the Act of 1862 carried at least an implication (by reason of the Act's limitation to the Queen's dominions properly so called) that the scope of the writ was so conscribed and would not extend to a " protectorate."

There is no authority binding on this court which covers the question. In *Ex parte Sekgome* [10] the issue of a writ of habeas corpus to the Protectorate of Bechuanaland was sought but, as the Divisional Court observed, the broad proposition in this case of the Attorney-General and his co-respondents does not appear to have been raised; on the contrary, the last part of the report of Mr. Rowlatt's argument for the Secretary of State seems to me rather to concede the opposite view. "Thirdly," he is reported as contending,[11] "although the Bechuanaland "Protectorate is, it is contended, a foreign country within the "meaning of the Foreign Jurisdiction Act, 1890, that does not "necessarily prevent the application of the Habeas Corpus Act, "1862. Prima facie the writ of habeas corpus runs in the "Crown's dominions. For the purpose of habeas corpus dominion "cannot be judged by the same test as it is in the Foreign "Jurisdiction Act, 1890. Any territory in which the Crown's "writ of habeas corpus runs is part of the Crown's dominions "for that purpose, and if there were no court in the particular "place competent to issue the writ the old jurisdiction of the "King's Bench to do so possibly still exists." However that may be, there is no doubt that Kennedy L.J. was of opinion that the writ would not run in the Bechuanaland Protectorate as not being part of His Majesty's dominions; and Kennedy L.J.'s view was adopted by Cassels J. in the case of *In re Ning Yi-Ching.*[12] It is nonetheless clear that the other two members of this court took a different view upon this matter from Kennedy L.J. I do not repeat in this judgment the citations made by the Divisional Court from the judgments. I add, however, a further passage from that of Vaughan Williams L.J.[13]: "In *Ex parte* "*Anderson*[14] no doubt seems to have been entertained as to "the power of the court at Westminster to issue a writ of habeas "to go to any place under the subjection of the Crown of England "whenever it is suggested to the court that a subject of the "Crown is illegally imprisoned. The only doubt seems to have "been as to the propriety of the issuing of such a writ to Canada, "a colony where separate jurisdiction has been established. The "statute of 1862 seems to have been passed merely for the "purpose of abrogating the jurisdiction of the courts at Westminster in favour of colonial independence by declaring "that no writ of habeas shall issue out of England into a "colony or foreign dominion where the Crown has a court of "justice having authority to grant and issue such writ and to "ensure throughout such colony or dominion due execution "thereof. I cannot, therefore, agree that the rule for a habeas "should be discharged on this ground." I add also the following further passage from Kennedy L.J.'s judgment.[15] I apologise for the length of the citation. "But I see no reason to assign "to the phrase," that is, "His Majesty's dominions," "less "than its ordinary force when it occurs in the Habeas Corpus "Act, 1862 (25 & 26 Victoria, chapter 20), in the preamble of the "Foreign Jurisdiction Act, 1890, and in the judgment of the "Court of Queen's Bench dealing with the question of the issue "of the writ from the common law standpoint in the case of "*Ex parte Anderson*,[16] which was decided shortly before the "Habeas Corpus Act, 1862, and which was, I believe, the cause "of the passing of that statute. If this view is correct, the "protectorate of a foreign country in which His Majesty has "and exercises power and jurisdiction as a protecting and not as "a ruling sovereign, and which he has never annexed to the "possessions of the British Crown, certainly cannot properly be "treated as part of His Majesty's dominions. The one and only "fact, upon the evidence in the present case, which has presented "to my mind any difficulty in so regarding the whole of this "Bechuanaland Protectorate has been this. It appears in the "evidence, and is not disputed, that in regard to a portion of "that Protectorate, as established in March, 1885, and dealt "with by the Order in Council of May 9, 1891, and in the subsequent proclamations made under that Order, the chiefs of "the local tribes in 1904 (see the Order in Council of May 16, "1904) 'abandoned all rights and jurisdiction in and over' such "portion, and the last-mentioned Order defined the lands of "which such portion consisted to be 'Crown lands' and vested "them in the High Commissioner, and that Gaberones, where "Sekgome is confined, lies within this area. Further, by proclamations dated respectively February 7, 1905, June 7, 1905, "and June 30, 1905, the High Commissioner, acting under the "powers conferred upon him by the Order in Council of May 16, "1904, has in fact made grants of certain tracts of these 'Crown "'lands' whilst retaining the district of and about Gaberones "as 'the Gaberones Crown Reserve.' Now I must frankly say "that I find it difficult to discern a clear line of practical distinction between such dealing with the lands in and over which the "local chiefs have abandoned all rights and jurisdiction and an "annexation of those lands by the Crown. But, as Lord "Halsbury L.C. observed in the course of the argument of

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[9] 3 E. & E. 487.

[10] [1910] 2 K.B. 576.

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[11] [1910] 2 K.B. 576, 587.

[12] (1939) 56 T.L.R. 3.

[13] [1910] 2 K.B. 576, 592.

[14] 3 E. & E. 487.

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[15] [1910] 2 K.B. 576, 622, 624.

[16] 3 E. & E. 487.

"counsel in *Staples* v. *The Queen*,[17] 'I never heard that you "'can force a sovereign to take territory'; and not only does "the Order in Council of May 16, 1904, itself (clause 4) state "'This Order may be cited as "The Bechuanaland Protectorate "'"(Lands) Order in Council, 1904,"' but the subsequent "proclamations relating to these 'Crown lands,' to which I have "referred, designate them in their preambles as certain lands "'situate within the Bechuanaland Protectorate' which have "been vested in the High Commissioner by the above-mentioned "Order in Council. The clear inference from such language is "that these Crown lands (which, as I have said, include "Gaberones) have not been annexed to His Majesty's dominions, "but are treated by the sovereign as still integral portions of "the protectorate."

I have added this last citation because it seems to me to indicate that there was present to the mind of Kennedy L.J. the point which I think should be decisive of any case of this kind—namely, that the question should not be determined by reference merely to the fact that the country in question bears the label "protectorate," but must, or at least may, depend on the extent to which the Crown (or the Crown and Parliament) has in fact assumed and exercises jurisdiction on and over the affairs (and particularly the internal affairs) of the country to the exclusion of any other, or other effective, jurisdiction.

I therefore agree so far with the Divisional Court that, in the existing state of the authorities, the matter must be resolved by reference to principle. But it is, I regret, at this point that I have felt compelled respectfully to a different conclusion from that stated by Lord Parker C.J. The matter of principle is there stated in the judgment[18]: "The writ of habeas corpus is a "prerogative writ, namely, as this court conceives it, a manifestation of the sovereignty of the Crown and an instrument by "which that sovereignty is exercised. It follows that there can "be no power to issue this writ which is not derived from, or "which is more extensive than, such sovereignty. The Crown "is not sovereign over the common law but retains only such "part of that unqualified plenitude of absolute power which "constitutes sovereignty as the common law accords to the "Crown. At the same time the prerogative is part of the "common law of this country and exists by force and virtue of "the law. Therefore the writ of habeas corpus may lawfully be

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[17] Unreported.

[18] Ante, p. 276.

"issued only in cases where the common law or some statute "permits or requires the Sovereign to issue it. The Sovereign "herself cannot issue the writ otherwise than through this court, "which derives any jurisdiction it has from her, and in which in "contemplation of law she is always present.

"The concept of sovereignty of any ruler or State is in its "aspect of power essentially related to the area throughout "which the sovereign power is lawfully exercisable, that is, is "exercisable without restraint or hindrance by any competing "sovereignty. It is self-evident, in the opinion of the court, "that throughout the territorial dominions of the Crown—that "is all territory belonging to the Crown, as distinct from territory "belonging to any person who is for the time being King or "Queen (which if abroad would remain for this purpose "'foreign')—the Crown possesses full sovereignty provided "that, or to the extent that, the common law has not imposed "limitations upon that sovereignty. Thus by the Coronation "Oath the British sovereign undertakes to 'govern the people "'of the United Kingdom of Great Britain and Northern Ireland "'and the dominions thereto belonging, according to the "'Statutes in Parliament agreed on and the laws and customs "'of the Realm.'

"Looked at in this way, the undoubted duty of the Sovereign "to protect her subjects, and the undoubted right of the subject "to protection, are limited to protection in the Sovereign's "dominions."

No arguments were in fact addressed to us upon this statement of principle by the Divisional Court. As I understand it, however (and I hope I do not misinterpret it), the statement (and particularly its second paragraph) seems to proceed to some extent at least upon the basis of the theory of the indivisibility of sovereignty, particularly associated with the name of Austin. But if this theory was accepted in England 100 years ago (and influenced, as I shall show, the prevalent English view of those days as regards protectorates) it is not, as I believe, accepted now. Equally it is, I think, clear that if 100 years ago the notion of a protectorate was exemplified by the case of the Ionian Islands, as regards which the power and jurisdiction of this country were limited to matters of external relations, in modern times the nature of protectorates may vary enormously, and may extend to cases where the protecting power assumes in regard to the protected country a jurisdiction over its internal affairs (as well as external relations) which is exclusive of other jurisdictions and is for practical purposes indistinguishable from the power or jurisdiction exercised over colonies or conquered countries. In the recent case in this court of *Nyali Ltd.* v. *Attorney-General* [19] Morris L.J. cited the judgment of the Privy Council in *Sobhuza II* v. *Miller*,[20] delivered by Lord Haldane: "The question which at once presents itself is, what is the "meaning of a protectorate? In the general case of a British "Protectorate, although the protected country is not a British "dominion, its foreign relations are under the exclusive control "of the Crown, so that its Government cannot hold direct com-"munication with any other foreign power, nor a foreign power "with its Government. This is the substance of the definition "given by Sir Henry Jenkyns at page 165 of his book on British "Rule and Jurisdiction Beyond the Seas. Their Lordships think "that it is accurate, and that it carries with it certain conse-"quences. The protected State becomes only semi-sovereign, "for the protector may have to interfere, at least to a limited "extent, with its administration in order to fulfil the obligations "which international law imposes on him to protect within it "the subjects of foreign powers. A restricted form of extra-"territorial sovereignty may have its exercise called for, really "involving division of sovereignty in the hands of protector and "protected. But beyond this, it may happen that the protecting "power thinks itself called on to interfere to an extent which "may render it difficult to draw the line between a protectorate "and a possession," and: "The Foreign Jurisdiction Act thus "appears to make the jurisdiction, acquired by the Crown in a "protected country, indistinguishable in legal effect from what "might be acquired by conquest. It is a statute that appears to "be concerned with definitions and secondary consequences "rather than with new principles." Having referred to *Rex* v. *Earl of Crewe* [21] and *In re Southern Rhodesia*,[22] Lord Haldane said [23]: "Both of these cases imply that what is done may be "unchallengeable on the footing that the Order in Council, or "the proclamation made under it, is an act of State. This "method of peacefully extending British dominion may well be, "as little generally understood as it is, where it can operate, in "law unquestionable."

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[19] [1956] 1 Q.B. 23; [1955] 2 W.L.R. 649; [1955] 1 All E.R. 646.

[20] [1926] A.C. 518, 522; 42 T.L.R. 446.

[21] [1910] 2 K.B. 576.

[22] [1919] A.C. 211; 34 T.L.R. 595.

[23] [1926] A.C. 518, 525.

It is at this point that I venture to revert to the state of the evidence and the assumptions that we have to make in the present case. The Secretary of State for the Colonies in his affidavit—following closely the similar affidavit of Lord Crewe in *Sekgome's* case [24]—says: "The Northern Rhodesia Protectorate "is a foreign country within which Her Majesty has power and "jurisdiction by treaty, grant, usage, sufferance and other lawful "means within the meaning of the Foreign Jurisdiction Act, "1890. The territory of the said protectorate is foreign territory "under Her Majesty's protection. It has never been acquired "by settlement or ceded to or conquered or annexed by Her "Majesty or any of Her Royal predecessors, nor has Her "Majesty or any of Her Royal predecessors recognised the same "as, nor is it, part of Her dominions, but She has power and "jurisdiction within the same." But one may ask, what in the end of all is the extent of the power and jurisdiction? With whom were the "treaties" (if any) made and what was their nature? What other power, jurisdiction or "sovereignty" exists in the country and in whom is it vested? One thing seems plain enough, namely, that the terms of the Rhodesia and Nyasaland Federation Act, 1953, contain no hint of any power or jurisdiction vested elsewhere than in the Crown or in the Crown and Parliament, and no hint of any distinction in jurisdiction between Northern Rhodesia and the other components of the federation. Finally, the applicant, Mwenya, a native of the country, is, or is for present purposes conceded to be, a British citizen.

If, then, the nature and extent of the "power," "dominion," "jurisdiction" or "sovereignty" (whichever word you choose to use) as regards the internal affairs and governance of Northern Rhodesia is "indistinguishable in legal effect" from what might be acquired by conquest, then, I ask myself, upon what principle is it to be said that the writ of habeas corpus, this "most "efficient protection ever invented for the liberty of the "subject," will not run? On the assumption that I am making, upon what principle can the Court of Queen's Bench be debarred from making an order in favour of a British citizen unlawfully or arbitrarily detained? For my part—and always on the assumption that I am making—I can see no good answer to the question. Put otherwise, the answer must, as I think, be (and as Kennedy L.J. thought): because the country concerned is a "foreign "dominion" from which the jurisdiction, so far as relevant, of the Crown or the Crown and Parliament, is excluded or has never been assumed or exercised.

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[24] [1910] 2 K.B. 576.

I have found support for the view that I have formed, and particularly for the infinite variety which the relevant characteristics of protectorates may assume, in the chapter entitled " Protectorates, " Spheres of Influence and Barbarous Countries " (Chapter 3) in Mr. W. E. Hall's book (1894) on The Powers and Foreign Jurisdiction of the British Crown. After stating at the beginning of his chapter that the meaning of the term " protectorate " is indefinite and variable, having only the common characteristic that the protected community has parted with freedom of action in foreign affairs, Mr. Hall proceeds to show that as regards the extent of jurisdiction exercised within a protected country the view and practice of Great Britain were, for some time at least, far more limited than those of Germany and France. " It is " more probable," he says (p. 206), " that the Austinian theory " of the indivisibility of sovereignty furnished the influence under " which they [English statesmen and lawyers] long persisted in " regarding protected States or communities as independent, " and which induced them, arguing logically from their premisses, " to repudiate all possession of power within the territory, whether " by way of privilege or obligation, except over British subjects." Thus, the author states (p. 207) his belief that all States represented at the Berlin Conference of 1884–85, except Great Britain, maintained that a protectorate included the right of administering justice over the subjects of other civilised States. Mr. Hall then shows how the British view changed, citing by way of example the Pacific Protectorates. " In this case," he wrote (p. 215), " authority over foreign subjects is appropriated independently " of consent on the part of other European states. It rests upon " the implied assertion that exercise of jurisdiction on all persons " within a protected territory is so necessary, or at least so " natural, a consequence of the protectorate, where native " administration and judicial organisation is inadequate, that " foreign powers may be expected to acquiesce in its enforce- " ment in the same manner as they acquiesce in the effects of " complete sovereignty ": and later (p. 225): " If the foregoing " statement of the position held by Great Britain within a " protected territory is accurate, it may be expected that the " English courts will consider that, in assuming a protectorate, " the Crown takes to itself powers which, so far as they go, are " identical with those that it would have in a conquered country. " It can prescribe laws until Parliament chooses to legislate;

"and it can subject to its administration all persons upon the "protected soil. This is done in those protectorates where "general jurisdiction is claimed. The Crown, in the exercise "of its prerogative rights, legislates by applying English law, so "far as it is suitable to a rough state of society; and it applies "the law indifferently to all persons whom it finds within the "territory over which, by agreement or assumption, it has "obtained a limited territorial jurisdiction." Finally, he deals with the question, Are natives of the protected country to be treated as foreigners or as subjects of the protecting State? "If, "however, the views expressed (p. 227) in the foregoing sections "are well founded, it becomes logically necessary that the "amount of protection shall be afforded to the members of a "protected community, when within the territory of a foreign "state, which is implied in the political connection between "Great Britain and their country, and which is correlative to "the security offered by Great Britain to persons who enter its "protectorates under the wing of a foreign power. In other "words, they share the right of subjects to enjoy the advantages "of such good order as, in different degrees, is maintained within "the civilised possessions of a European state and in its "protected territories." It is in reference to this last question that the fact or assumed fact may be relevant that Mwenya is a British subject.

For these reasons I am, for my part, and with all respect to the contrary view of the Divisional Court, unable to accept the contention that because Northern Rhodesia is a "protectorate," therefore, and as a matter of course and of principle, it follows that the Court of Queen's Bench has no power or jurisdiction to make an order of habeas corpus in the case of a British subject in that country who is unlawfully or arbitrarily detained there. I need not say that I do not intend by any means to assert a contrary general proposition—namely, that the writ of habeas corpus will run in any protectorate—still less that it will run in any foreign country. But, as it seems to me, if upon a proper investigation of the facts, it appears that the internal governance of Northern Rhodesia is in legal effect indistinguishable from that of a British colony or a country acquired by conquest, then, in conformity with the nature of the writ as expounded by the learned authors to whom I have referred, Bacon, Blackstone, Coke, Mansfield, I see for my part no reason for denying jurisdiction to the court.

It is true that the result will be (if I am right) that the question in any given case will or may involve inquiry as to the exact extent and nature of the jurisdiction or dominion exercised in fact by the Crown. But to this I suggest there is a twofold answer, namely: (1) As a matter of history and logic, the availability of the "most efficient protection ever invented for the "liberty of the subject" should not depend upon a mere label or on matters of convenience. (2) It is inconsistent with the general principles of our law to try to decide broad general questions without regard to the facts of particular cases. If the fact is that the power and jurisdiction of the Crown vis-à-vis Northern Rhodesia is (as the Act of 1953 seems ex facie clearly to suggest) in no whit different from that exercised in a "colony" or "dominion," then in my view there is nothing, historically or logically, which bars the making of an order of habeas corpus directed thereto—and, indeed, the balance of opinion in the authorities is plainly the other way. What may be the result in other cases is a matter which will depend on the facts of those cases when they come before the court.

In conclusion, then, I do not attempt anything in the way of definition which would or might provide the answer to other cases, beyond saying that the jurisdiction ought not to be limited to territories, outside England, which are strictly labelled "colonies or foreign dominions," but will extend to territories which, having regard to the extent of the dominion in fact exercised, can be said to be "under the subjection of the Crown" and in which the issue of a writ will be regarded (in Lord Mansfield's words) as "proper and efficient." In other words, I would hold that we ought not in this case to lay it down, in disregard (as it seems to me) of what has been said by the highest authorities, that the jurisdiction is limited to colonies and foreign dominions strictly so called; and, disagreeing accordingly with the Divisional Court, should refer the matter back to them, in the light of what is said above, to determine the other issues raised in the present case.

ROMER L.J. The essential contention of the Crown on the preliminary issue, which was argued before us, may be expressed syllogistically as follows: The writ of habeas corpus will in no circumstances issue into any British Protectorate; Northern Rhodesia is a British Protectorate; therefore the writ will not issue into Northern Rhodesia. There is no difficulty with regard to the second premise of this syllogism, for it is sufficiently established by the affidavit of Mr. Lennox-Boyd. The difficulty, in my judgment, lies in the first premise. In the argument which counsel for the Crown addressed to us with a view to establishing it, they were content, it appeared, that almost every material assumption should be made against them. But they contended (inter alia) that it is irrelevant—and, indeed, not permissible—to inquire into the nature and extent of the control which the Crown and Parliament have imposed on a protectorate; and that it is equally irrelevant to inquire whether courts have been established there with jurisdiction to issue writs of habeas corpus themselves. The reason why it is suggested that none of such matters as these is of relevance on the present issue is that a British Protectorate, no matter what features it possesses, remains foreign territory and there is no jurisdiction to investigate by habeas corpus machinery the validity of the detention of any person, even a British subject, within such territory.

I entertain a suspicion, amounting almost to a certainty, that this broad and basic proposition of the Crown will be found, when the facts have been explored, not to arise for decision at all in the present case. It is, accordingly, a matter of some regret, in my opinion, that this court has been asked to pronounce upon it in the present appeal; and I share the feeling of uneasiness to which the Master of the Rolls has referred in his judgment. Inasmuch, however, as the Divisional Court have accepted the Crown's proposition, and we are asked to decide whether they were right in doing so, we are bound, as it seems to me, to express our views upon the matter.

I am not prepared to accede to the submission of the Crown in the general and unqualified way in which it has been presented. No authority was cited to us which compels us to accept it; and, in the absence of such authority, I can see no satisfactory principle upon which the Crown's proposition should be supported. The degree of sovereignty assumed and exercised by the Crown, at the instance of Parliament, when a protectorate is established varies in every individual case. It may be confined to the control of the protectorate's foreign relations, in which case all matters of an internal and domestic character are left wholly in the hands of the native sovereignty or power. On the other hand "it may happen that the protecting power thinks "itself called on to interfere to an extent which may render "it difficult to draw the line between a protectorate and a "possession" (*per* Lord Haldane in delivering the judgment of the Privy Council in *Sobhuza II* v. *Miller*[25]). A similar view is expressed in Jenkyns' British Rule and Jurisdiction Beyond the Seas (p. 192). It is quite clear from the language of the Habeas Corpus Act, 1862, that Parliament recognised the jurisdiction of the High Court in England to issue writs of habeas corpus into the colonies or foreign dominions of the Crown unless courts of justice had been lawfully established there having authority to grant and issue such writs themselves. If so, it would seem to be an illogical anomaly that the writ could not issue into protectorates of the kind envisaged by Lord Haldane in which no courts had been established capable themselves of issuing such writs. As is stated in the passages from Blackstone's Commentaries and Bacon's Abridgement cited in the judgment of the Divisional Court, the object, for relevant purposes, of the writ of habeas corpus is that the sovereign should be informed why any of her subjects are imprisoned and be satisfied as to the validity of their detention. The machinery provided by the writ for obtaining this information would obviously be ineffective in relation to any territory in which the Crown had to no extent displaced the sovereign power; and because of this, and also because of the comity of nations, the writ would not issue into, for example, the United States of America for the purpose of inquiring into the detention of a British subject who is imprisoned there. But in territory in which the Crown, on the advice of Parliament, has assumed such a degree of power and control that the protected State is to all intents and purposes a British possession and in which the writ, if issued, would certainly be effective in its results, it is difficult to see why the sovereign should be deprived of her right to be informed through her High Court as to the validity of the detention of her subjects in that territory. The contrary view would result in a subject having no redress at all if he were detained, however unlawfully, in a protectorate which was in substance a colony but which had no effective courts of its own. I think that counsel for the Crown were disposed to agree that hardship such as this might arise if the full width of their submission were to be accepted; but they said that it was a matter for Parliament to deal with, if they thought it proper to do so, and that, however closely a protectorate may have become assimilated to a colony, it nevertheless remains foreign territory and habeas corpus cannot therefore issue into it. For myself I do not believe that the right of the sovereign to inquire into the liberty of her subjects depends on the narrow distinction between territory which is part of Her Majesty's dominions in substance and territory which has become part of her dominions in fact by a formal Act of annexation. The question whether the writ can issue does not, in my judgment, depend upon such a distinction as that but on the propriety and effectiveness of issuing it. The propriety and effectiveness of issuing it into Northern Rhodesia may have to be decided hereafter; but for the purpose of considering the validity of the Crown's submission, it must be assumed that in the case of some protectorates the issue of the writ would be both proper and effective.

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[25] [1926] A.C. 518, 523.

As I have already indicated, there is no authority, so far as I am aware, compelling this court to hold that the writ of habeas corpus will not issue into any British Protectorate. The decisions and judicial utterances relevant to the question have been exhaustively reviewed and considered in the judgment of the Divisional Court and by the Master of the Rolls, and I do not propose to consider them again. In *Cowle's* case [26] Lord Mansfield used language which, if taken at its face value, is inconsistent with the Crown's contention. Vaughan Williams L.J., in *Sekgome's* case,[27] clearly took the view that the writ could, in a proper case, issue into a protectorate, and I agree with that view notwithstanding the contrary opinion entertained by Kennedy L.J. on the question.

I accordingly agree with the Master of the Rolls in rejecting the broad proposition which the Crown advanced before us. I agree also with him in thinking that the matter will have to be referred back to the Divisional Court for inquiry into the further matters which arise upon the view we have taken and to which he has referred in his judgment. Mr. Cumming-Bruce urged on us that the courts cannot inquire into the degree of sovereignty which has been achieved in Northern Rhodesia or in any other British Protectorate. He cited no authority, however, in support of that proposition and I can find no foundation for it in principle. Moreover, the proposition is difficult to reconcile with Lord Haldane's observations in *Sobhuza II* v. *Miller*,[28] and with Denning L.J.'s judgment in *Nyali Ltd.* v. *Attorney-General*,[29] in which the Lord Justice said [30] that in regard to a protectorate one must look to the acts of the Crown to see what jurisdiction it has exercised. I am therefore unable to accept Mr. Cumming-Bruce's submission on this point. I agree that the appeal should be allowed.

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[26] 2 Burr. 834.
[27] [1910] 2 K.B. 576.
[28] [1926] A.C. 518, 523.
[29] [1956] 1 Q.B. 1.
[30] Ibid. 15.

SELLERS L.J. There may be, and without prejudging them there would appear to be on the face of the matters raised, good reasons why the writ of habeas corpus sought in this application would not be granted if the matters involved were heard and determined.

But those issues do not call for our consideration. They can, it is said by the Crown, all be treated as answerable in favour of the applicant. The present and, it is submitted, the conclusive answer to the application is that the English courts have no jurisdiction to issue a writ of habeas corpus ad subjiciendum in respect of a British subject detained wrongfully and illegally in a British Protected Territory. The British subject in such a territory, whether resident or temporarily on business or on holiday, cannot, it is said, look to this country's courts to restore him to freedom of which he has been deprived without justification, notwithstanding that if a court of this country were to inquire into the circumstances, to declare the detention unjustified and to order his release, the order could be carried out by reason of the power and force of the internal governmental control which this country might exercise over the territory in question.

If the judgment of the Divisional Court from which this appeal comes is right, then the power of the historic writ of habeas corpus is a more limited and qualified safeguard to the liberty of the subject than would appear to be necessary. The subject in Southern Rhodesia within Her Majesty's dominion may claim this "most famous" of English writs but not the subject in Northern Rhodesia, even though the rights of the Crown in the two territories may be "indistinguishable in legal effect," to use Lord Haldane's words already quoted by the Master of the Rolls.

There would be much force in an argument which set up and established the impossibility of enforcing an ensuing order of a court of this country, as in the case of a detention in a foreign country which was sovereign and independent, and over which our country had no jurisdiction or control, or in which our powers and activities were so limited and restricted that there would be conflict and confusion, if not open hostility, with the internal government of the territory in question if the order were sought to be enforced.

But that is not the argument and there is no submission that an order of a court in this country to release one of Her Majesty's subjects wrongly detained in Northern Rhodesia could not be enforced.

The affidavit of Her Majesty's Secretary of State for the Colonies sworn on June 12, 1959, states that the Northern Rhodesia Protectorate is a foreign country within which Her Majesty has power and jurisdiction.

If, as for the present purposes of this case must be assumed, the power and jurisdiction of this country to enforce an order of an English court in Northern Rhodesia is as great and as extensive, or even merely as effective as it would be in any part of territories which had in fact been acquired by settlement or ceded to or conquered or annexed by Her Majesty or any of Her Royal predecessors, and which is accepted or recognised as part of Her Majesty's dominions, why, one would inquire, should this great bulwark of freedom stop short at a territorial boundary?

It can well be recognised, as development of internal government and independence within Her Majesty's territories and dominions take place or have taken place, within the vast confines of the British Commonwealth of Nations, that the enforcement of a writ of habeas corpus issued from our courts might prove more difficult and be more resented within Her Majesty's territories than in a protectorate and, no doubt, the Habeas Corpus Act, 1862, was a wise and timely provision.

There may come times in a country's history when it may appear highly inconvenient or politically hazardous that the law should pursue its course, but in a court of law such considerations are irrelevant and cannot serve to deprive a subject of a right which an English court could give and enforce.

Ex parte Anderson [31] is perhaps the most striking of the cases where the writ of habeas corpus has issued from an English court in respect of a detention outside the territorial boundaries of England but within Her Majesty's dominions—in that case—Canada. The case was only argued on one side, and at least two of the judges later tended to minimise its effect, but it brought about the Habeas Corpus Act, 1862, which provided that no writ should issue out of England into any colony or foreign dominion of the Crown having a court competent to grant and issue the said writ and to enforce it. In addition to the authority of *Ex parte Anderson,*[31] this statute would impliedly indicate that the writ would lie within Her Majesty's colonies and foreign dominions if no such court existed, and I do not understand the Crown to have submitted otherwise. The submission of the Attorney-General and Mr. Cumming-Bruce was that there was a strict territorial boundary which was conclusive as to the scope of the writ.

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[31] 3 E. & E. 487.

If this restriction had throughout history always been the confines of England and the normal territorial boundaries of the court, the argument would have been compelling. But once the writ has gone beyond our shores, as it has, and outside the normal jurisdiction of the court, why should the writ be limited by territorial boundaries? The writ is concerned with personal freedom and the emphasis in principle, it would seem, is not on where the wrongful detention is occurring but, assuming the court is satisfied that the detention is without justification whether it can, having regard to the proper interests, rights and powers of those governing the place of detention, make an order which can be enforced and so release an applicant who has asked for justice before it.

If that, as I would hold, is the principle to be applied—an elementary principle of justice, as I see it, having its roots, in Lord Birkenhead's words, " deep in the genius of our common " law "—then there would be no question of this court extending its own jurisdiction, as the Attorney-General alleged and as he contended rightly, we had no power to do, but only an application of one of the greatest powers of our law to the changing circumstances of a developing society.

It has been accepted at the Bar that the point has not been authoritatively decided, but I do not regard the main trend of opinion to be against the view I have expressed. Many passages in judgments in several cases have been referred to and relied on, one way or the other, to advance or refute the argument. They do not reveal unanimity of opinion, and there is perhaps uncertainty of meaning and intention in some of the expressions used.

The judges in the earliest cases had not in mind the issue which arises here, but I think it would be difficult to read into any of them (until as late as Kennedy L.J. in *Sekgome* [32]) a refutation of the powers of the English court to issue the writ to safeguard a subject's freedom in a territory over which this country had wide powers of jurisdiction and control, wide enough to enforce as a matter of ordinary administration any order the court might make.

[32] [1910] 2 K.B. 576.

The judgment of the Lord Chief Justice in this case cites Blackstone. The reason for his view that the writ would run "into all parts of the King's dominions" is that "for the King "is at all times entitled to have an account, why the liberty of "any of his subjects is restrained, wherever that restraint may be "inflicted."

Bacon's Abridgment is to the same effect. With great respect to the view of the Divisional Court, I would have felt that the substance, if not the precise words, of Lord Mansfield's judgment in *Rex* v. *Cowle*,[33] tended to support the argument for the applicant here on the issue of jurisdiction. Lord Mansfield gave the writ the greatest breadth of application which in the then circumstances could well be conceived. "There is no doubt "as to the power of this court; where the place is under the "subjection of the Crown of England; the only question is as to "the propriety." "Subjection" is fully appropriate to the powers exercised or exercisable by this country irrespective of territorial sovereignty or dominion, and it embraces in outlook the power of the Crown in the place concerned.

Both Lord Mansfield and Cockburn C.J. later in *Ex parte Anderson*[34] drew attention to the fact that in the constitution given to Berwick and Canada respectively, there was no clause restraining or expressly abrogating the right of the superior courts (then at Westminster) to issue the writ of habeas corpus to those territories. On the other hand, the establishment in a protectorate of courts with a comparable jurisdiction might well be said impliedly to abrogate the right of the courts here to issue a writ of habeas corpus and so, with the same effect as the Habeas Corpus Act, 1862, might be sufficient to defeat an application to these courts.

In this court in 1910 Vaughan Williams and Farwell L.JJ. in *Rex* v. *The Earl of Crewe, Ex parte Sekgome*,[35] expressed opinions on the precise question of a writ of habeas corpus issuing from this country into protected territory, but I accept that these views of these judges do not form the basis of their decision in that case.

I would join Vaughan Williams L.J. in this part of his judgment[36]: "I ask myself why, if the writ of habeas corpus "can be issued to the King's territorial dominions, the writ should "not be ordered to go to any country or place under the

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[33] 2 Burr. 834.

[34] 3 E. & E. 487.

[35] [1910] 2 K.B. 576.

[36] Ibid. 605.

"subjection of the Crown whenever it is suggested to the court "in England that a subject of the Crown is illegally imprisoned," and I would concurringly join the judge in the answer he gave. It does not seem to me, also, that the mere fact of absence of annexation and theoretical possession should deprive the Crown and those who are under the law from the benefits and power of the writ of habeas corpus.

The writ of habeas corpus ad subjiciendum is to be treasured and preserved, and should be available and so used that it may ever continue to deserve undiminished the high praise which so often, and from so many sources, it has received. I waited in vain, in the course of the argument on behalf of the Crown, to hear an endeavour to support the widest application of the writ, and an expression of regret or reluctance that it was felt to be incumbent to point out to the court such obstacles as may be thought to be in the way of its unfettered use.

It may well be that it would be against propriety for the writ to issue in this particular case. There appear to be courts in Northern Rhodesia set up by Her Majesty in Parliament which could give any redress the applicant deserves and do it more conveniently and expeditiously than here, but I am not prepared to say, as we are solely asked to say on this appeal, that the English courts have no jurisdiction in any circumstances to entertain an application for a writ of habeas corpus ad subjiciendum in respect of an unlawful detention of a British subject in a British protectorate, however extensive our jurisdiction there, or however powerful our control. It is desirable, as the Crown submitted, that proceedings for a writ of habeas corpus should be swift and a subject's rights in the matter should be clear, but I see no inherent difficulty or undue delay in an English court inquiring into the extent of the jurisdiction, power and control exercised by this country in any protectorate and in any event, in agreement with my Lords, I would not hold, in the absence of compelling authority, that our courts ought to be precluded from considering, if it became necessary, the extent of the Crown's jurisdiction.

I would allow the appeal on this preliminary question and would let the case be heard on its merits.

After their Lordships' judgments had been delivered the case was adjourned to allow the parties to consider the effect of the judgments, and whether there should be argument on the second point raised on the appeal, namely, whether the writ could issue to the Secretary of State for the Colonies.

C. A.
1959

Mwenya, *Ex parte.*

October 24. On the resumed hearing their Lordships were informed that the Governor of Northern Rhodesia had, on October 20, made an order revoking the restriction order in respect of Mwenya on the ground that it was no longer necessary in the interests of public security that Mwenya should remain subject to the order. In those circumstances, counsel were agreed that there was no ground for continuing the proceedings.

Appeal allowed.

Order that all further proceedings in this matter be stayed save so far as may be necessary to enforce the order for costs. Mwenya to get his costs as against the Governor of Rhodesia and the District Commissioner in the Court of Appeal and below, and his costs as against the Secretary of State for the Colonies in the Court of Appeal and below, so far as such costs related to the matter decided in the Court of Appeal.

Solicitors: *Potel, Tattersall & Lake; Treasury Solicitor; Charles Russell & Co.*

B. A. B.

1959
July 13, 14, 15, 24.

Salmon J.

ATTORNEY-GENERAL AND ANOTHER *v.* ST. IVES RURAL DISTRICT COUNCIL AND ANOTHER.

Land Drainage—Maintenance—Liability for repair and maintenance of drains—Whether responsibility of rural district council or county council—Local Government Act, 1929 (19 *Geo.* 5, *c.* 17), *s.* 30 (1).

Local Government—Nuisance—Non-feasance—Drain—Flooding of land through non-repair of drains—Whether local authority liable—Whether personal right of action maintainable by landowner.

Statutory Duty—Civil right, whether created—Local authority—Duty to maintain drain—Enclosure Acts.

Land farmed by the plaintiff had from time to time been seriously flooded partly as a result of the non-repair of two drains which ran adjacent to and through the land. By an award under an Enclosure Act of 1800 the drains were maintainable by the surveyor of the highways of the parish; subsequently these duties were transferred to the local highway board and by the Local

[Reported by E. Caryl-Thomas, Barrister-at-Law.]

Government Act, 1894, they were transferred to the rural district council. The question was whether the responsibility for maintaining and repairing the drains now lay on the county council as highway authority by virtue of section 30 (1) of the Local Government Act, 1929.[1] The plaintiff and the Attorney-General on the relation of the plaintiff claimed (1) a declaration that one or other of the councils was bound in law to maintain the drains and keep them in repair, and (2) damages against one or other of them:—

Held, (1) that the drains were part of the land drainage scheme, and the function of maintaining and repairing them was not a function with respect to highways within the meaning of the proviso to section 30 (1) of the Act of 1929; accordingly, by that section the duty to maintain and repair the drains was not transferred to the county council but was reserved to the rural district council.

(2) That the immunity of highway authorities in respect of non-repair of highways did not extend to the rural district council in the present case to exempt them from liability for non-feasance in respect of the maintenance and repair of the drains.

(3) That the Enclosure Act, 1800, was passed and the award made for the benefit of the persons in favour of whom the enclosures were made; therefore a person whose land was immediately adjacent to the drains and through whose land the drains passed had a personal right to sue in a case of breach of duty to maintain and repair the drains; accordingly, the plaintiff was entitled to the declaration and to damages.

Dicta of Atkin L.J. in *Phillips* v. *Britannia Hygienic Laundry Co.* [1923] 2 K.B. 832, 841, and of A. L. Smith L.J. in *Groves* v. *Lord Wimborne* [1898] 2 Q.B. 402, 407; 14 T.L.R. 493 applied.

ACTION.

The following facts are taken from the judgment. The plaintiff, Thomas Brownlee Paisley, was a farmer who farmed land in the parish of Holywell-cum-Needingworth in the county of Huntingdon. Two drains known as Parsons Drove and Heath Drain ran adjacent to and passed through the plaintiff's land.

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[1] Local Government Act, 1929, s. 30 (1): "As from the appointed "day, every county council shall be "the highway authority as respects "such part of the county as is for "the time being comprised in any "rural district and as respects the "highways therein, and as such shall "have all such functions under the "Highway Acts, 1835 to 1885, as "were exercisable by rural district "councils who by virtue of the Local "Government Act, 1894, became "successors of highway boards, and "rural district councils shall cease "to be highway authorities: Pro- "vided that nothing in this section "shall affect the functions of rural "district councils under the Local "Government Act, 1894, as respects "rights of way and encroachments "on roadside wastes, or any func- "tions not being functions with "respect to highways exercisable at "the appointed day by rural district "councils as successors to surveyors "of highways or highway boards."

These drains were originally natural watercourses. They were small tributaries of the Great Ouse and the natural drains for the land on each side of them. They left the Great Ouse outside the parish of Holywell, joined together inside the parish, and flowed onward to the Ouse. The land on each side of the drains sloped towards them and downwards towards the River Ouse. The drains at their source were only two or three feet wide and quite shallow, but gradually broadened and deepened as they reached Holywell.

No work had been done on these drains since 1947. At the date of the issue of the writ the drains had for years been seriously choked, overgrown and silted and were generally in a very bad condition. The plaintiff's land had from time to time been seriously flooded partly as a result of the non-repair of the drains. This flooding had interfered with his farming activities and caused him damage.

It was common ground that the duty to keep the drains in proper repair lay on one or other of the defendants. The plaintiff brought this action claiming (1) a declaration that the first defendants, St. Ives Rural District Council, alternatively the second defendants, Huntingdon County Council, were bound in law to maintain the drains and keep them in repair; and (2) damages against one or other of the defendants. There was joined to this claim a claim by Her Majesty's Attorney-General, on the relation of the plaintiff, for a declaration in the same terms as that claimed by the plaintiff personally.

Harold Williams Q.C. and *A. L. Figgis* for the plaintiffs. Liability for maintenance and repair of drains rested upon rural district councils from 1894 by virtue of the Local Government Act, 1894, and it still rests upon them unless it was transferred by the Local Government Act, 1929, to the county council. The functions of rural district councils between 1894 and 1929 were not uniform, because some succeeded to highway boards and some did not. That lack of uniformity may have been transmitted to their successors.

It is submitted that the operative part of section 30 (1) of the Act of 1929 is effective to transfer the duty to maintain and repair drains to the county council, and this case turns on the construction of the proviso to section 30 (1). The question is whether the responsibility for maintaining and repairing the drains lies on the county council as highway authority, or whether the effect of the proviso to section 30 (1) is that that responsibility is reserved to the rural district council. The facts in this case closely resemble those in *Attorney-General* v. *Tamworth Rural District Council*,[2] where it was held that it was within the jurisdiction of the commissioner to order the surveyor of highways to repair and cleanse the watercourse and to raise the expenses of so doing by means of a rate. The specific statutory duty to maintain drains was imposed on the surveyor of the highways of a parish by an award under the Enclosure Act, 1800 (39 & 40 Geo. 3, c. 64). Prima facie breach of that statutory duty would give rise to an action by an individual who suffered special damage.

The Attorney-General is asking for the work to be done by one or other of the defendants, and it is submitted that he must succeed against one of them. The question is whether the matter is a "function with respect to highways" within the meaning of the proviso to section 30 (1). There should be an order for putting these drains into repair, and that there should be an inquiry as to the damages suffered.

C. E. Scholefield Q.C. and *G. J. Ponsonby* for the first defendants. What must be borne in mind is that in 1803, the date of the award, highways were still repaired only by statute labour. This was very inefficient and roads were simply mud and stones. Any accumulation of water destroyed what little was done. It was an object of the legislature to prevent water in bulk from getting onto highways. [Reference was made to *Attorney-General* v. *Tamworth Rural District Council*[2] and to a number of former highway statutes.] That explains why, in this parish award, the duty of keeping these drains clear was imposed on the parish as a whole, instead of on the riparian owners. Although there are sections of these drains which are nowhere near the highway, ultimately, they carry any water they collect down so that it impinges on the highway.

By section 17 of the Highways Act, 1862, the function of keeping ditches clear was to be performed by the local highway boards, and by the Local Government Act, 1894, this function was transferred to the rural district councils. [*Reg.* v. *Heath*[3] was referred to.] The operative part of section 30 (1) of the Act of 1929 is effective to transfer the function from the rural district council to the county council. The words "with respect to "highways" in the proviso are wide in themselves and cover the duty to maintain and repair drains if those drains keep water off highways. That duty is therefore not reserved to rural district councils under the proviso. It could not have been the object of the legislature to make certain that the one part of the duties which the surveyor had performed altogether should be left with the rural district council instead of going to the county council. It was not a coincidence that the duty lay on the surveyor. The proviso is of no effect and was inserted only ex abundanti cautela, its sole purpose being to make it plain that only functions with respect to highways under the Highways Acts exercisable by rural district councils as successors to the highway boards passed to the county councils, and that all the rural district councils' other functions were left with the rural district councils.

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[2] (1901) 85 L.T. 190.

[3] (1866) L.R. 1 Q.B. 218; 7 B. & S. 285; 13 L.T. 669.

Where there is no internal drainage board (as in this parish) the county council have land drainage powers, but the rural district council have none. It would be so unreasonable to reserve this one function only to a body which has no powers and no facilities as a land drainage authority that it is not a construction which the court should be astute to find. Land drainage was never a function of the rural district council. On any view of the subsection, the first part of the proviso is otiose.

In any event, failure to maintain and repair the drains being non-feasance, the plaintiff has no right of action in respect of such failure. It is also submitted that if any relief should be granted to the plaintiff it should be limited on the ground that it is not actionable at the suit of an individual. It is not contested that it can be compelled by mandamus or mandatory injunction, but the question is whether there is in addition an action for damages. [Reference was made to *Sanitary Commissioners of Gibraltar* v. *Orfila*.[4]]

J. P. Widgery Q.C. and *A. P. Fletcher* for the second defendants. If section 30 (1) of the Act of 1929 should be approached as comprising two parts—an operative part and a proviso—the operative part does not have the effect of transferring the function to the county council. The situation in 1929, when the county council was taking over functions from the district council, should be contrasted with that in 1894 when the district council was taking over functions from the highway board. Two conditions have to be satisfied in respect of powers conferred on the county council by the operative part of section 30 (1): (1) they must be functions under the Highway Acts of 1835 to 1885; (2) they must be such of those functions as were exercisable on the appointed day by a particular class of rural district council, namely, those whose immediate predecessors had been highway boards and not some other kind of highway authority. This function is clearly not a function under the Highway Acts of 1835 to 1885, and therefore nothing passes to the county council. The proviso makes it clear that there was no intention of depriving the rural district council of other related functions which Parliament clearly intended them to maintain. Even if that meaning of the operative part is wrong, on any view of the proviso the county council is excluded because the particular functions in this case are not "functions with respect to highways."

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[4] (1890) 15 App.Cas. 400.

[SALMON J. That depends on how wide or narrow a view is taken of the words "with respect to."]

The *Tamworth* case[5] does not go much further than to say that it would be convenient for the surveyor to have this general power, but something more is required in this case. The explanation is relatively simple. By the time the drain had been built up it would be unfair to put the burden of its maintenance on the riparian owners; the parish, who would share the benefit, should take the burden. The words of the proviso should be given their ordinary meaning. These drains are primarily land drainage undertakings and not functions respecting highways. Their function is of a land drainage character which only has a very incidental effect on highway problems; obviously the purpose of these drains was to drain the countryside and not just the highways. The function of the drain should be considered as a test of what is meant by a "function with respect to highways." These duties are reserved to the first defendants. [Reference was made to section 67 of the Act of 1835.] The reason why the function was given to the surveyor was because it was intended to cast the burden of caring for this drain on the parish, and the surveyor was the only person who could carry it out; this was the most convenient way of charging this substantial financial burden on the parish.

If the above argument is wrong, then by virtue of the doctrine of non-feasance the defendants can avoid liability for past damage. It is not in dispute that the surveyor of highways could never be sued for damages by an individual who suffered injury by reason of his failure to maintain the highway. The second defendants are in the position of a highway authority being sued in respect of a duty respecting highways, and a duty to which they succeeded directly from the surveyor of highways; they are not therefore liable for damage resulting from non-feasance. The origin of the surveyor's exemption is to be found in *Young* v. *Davis.*[6] [*Irving* v. *Carlisle Rural District Council*[7] was also referred to.]

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[5] 85 L.T. 190.

Scholefield Q.C. replied.

Williams Q.C. in reply. As to the doctrine of non-feasance, it has been said that the doctrine has already been applied too widely: *Shoreditch Corporation* v. *Bull.*[8] Liability for the maintenance of a highway under the common law rests upon the inhabitants, but here Parliament expressly authorised the commissioners to direct by whom, when and how these drains were to be maintained. The plaintiff as an individual has a right to sue—there being no statutory remedy provided and a provision in a statute having been breached causing damage to him. He suffered damage beyond that suffered by the general public. [Reference was made to *Groves* v. *Lord Wimborne*[9] and *Cutler* v. *Wandsworth Stadium Ltd.*[10]]

Widgery Q.C. replied.

Cur. adv. vult.

July 24. SALMON J. read the following judgment in which he stated the facts and continued: The first question to be decided is upon which of the defendants lies the obligation to maintain and keep the drains in repair. By the Enclosure Act, 1800, relating to the parish of Holywell the commissioners therein designated were empowered, amongst other things, to scour out and widen the ancient brooks, ditches and watercourses in the parish of Holywell and to set out such new ditches, drains and watercourses of such breadth and depth and in such direction as the commissioners thought proper. The commissioners were further empowered and the duty imposed upon them to order and award by whom and in what manner the said brooks, ditches, drains and watercourses should thereafter be repaired, cleansed, scoured and maintained.

By an award in the year 1803 under the Enclosure Act, 1800, the commissioners ordered that Parsons Drove and Heath Drain, amongst other drains in the parish of Holywell, should thereafter for ever be maintained and kept in repair for the respective breadth and depth specified in the award by and at the expense of the surveyor of the highways for the time being of the parish out of a rate to be from time to time levied by him on the occupiers of lands and grounds within the parish.

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[6] (1863) 9 L.T. 145.

[7] (1907) 71 J.P. 212; 5 L.G.R. 776.

[8] (1904) 90 L.T. 210; 68 J.P. 415; 20 T.L.R. 254.

[9] [1898] 2 Q.B. 402, 407; 14 T.L.R. 493, C.A.

[10] [1949] A.C. 398; 65 T.L.R. 170; [1949] 1 All E.R. 544.

These duties were subsequently transferred by the Highway Act, 1862, s. 11, to the highway board for the district in which the drains lay. By section 25 of the Local Government Act, 1894, the duties of the highway board were transferred to the first defendants, and the highway board was abolished. The section reads as follows: " . . . there shall be transferred to the district " council of every rural district all the powers, duties, and liabili- " ties of the rural sanitary authority in the district, and of any " highway authority in the district, and highway boards shall " cease to exist, and rural district councils shall be the successors " of the rural sanitary authority and highway authority, and shall " also have as respects highways all the powers, duties, and " liabilities of an urban sanitary authority under sections 144 to " 148 of the Public Health Act, 1875, and those sections shall " apply in the case of a rural district and of the council thereof in " like manner as in the case of an urban district and an urban " authority . . ."

It is not disputed that between the year 1894 and the date when the Local Government Act, 1929, came into operation the duty to maintain and repair the drains lay upon the first defendants. A great deal in this case turns upon the true construction of section 30 (1) of the Local Government Act, 1929. [His Lordship read section 30 (1) and continued:] The first defendants contend that upon the true construction of this subsection their duty to maintain and repair the drains was transferred to the second defendants.

Mr. Widgery, for the second defendants, contends, first, that the main part of the subsection does not transfer the duties to which I have referred, inasmuch as these duties are not functions under the Highway Acts, 1835 to 1885. Alternatively, Mr. Widgery contends that if the main part of the subsection looked at by itself would be apt to transfer these duties, they are expressly reserved to the first defendants by the proviso.

In my judgment, the main part of section 30 (1) does transfer those duties to the second defendants. The Highway Act, 1862, is one of the Acts included in the words " the Highway Acts, 1835 " to 1885." Section 11 of the Highway Act, 1862, amongst other things, provides that "All such . . . duties, liabilities . . . as "are vested in or attached to . . . any surveyor . . . of any parish "forming part of the district, shall vest in and attach to the "highway board." One of the duties vested in and attached to the parish surveyor, and therefore one of his functions, was the duty or function of maintaining and repairing the drains in question. This duty or function was therefore transferred to the highway board by the Highway Act, 1862, and was exercisable by the first defendants as successors of the highway board under the Local Government Act, 1894. Accordingly, but for the proviso, section 30 would, in my judgment, clearly transfer the duties of maintaining and repairing the drains to the second defendants.

Mr. Widgery's second contention, namely, that the proviso reserves the duty to maintain and repair the drains to the first defendants, raises a point of some difficulty as well as of general importance. I understand that this point has been very much of a live issue between county councils and rural district councils since the year 1929, but so far has never been litigated.

Mr. Williams, for the plaintiff, supports the part of Mr. Widgery's argument relating to the construction of the proviso, although he dissociates himself from Mr. Widgery's first contention, with which I have already dealt.

Mr. Scholefield, for the first defendants, contends that the whole proviso is of no effect and is inserted in the section only ex abundanti cautela. He says that its sole purpose is to make it plain that only functions with respect to highways under the Highway Acts, 1835 to 1885, exercisable by rural district councils as successors to the highway boards passed to the county councils, and that all the rural district councils' other functions, for example, under the Public Health Acts, are left with the rural district councils.

If this be the true construction of the proviso, then the first part of the proviso is otiose.

Mr. Scholefield replies that on any view of the subsection the first part of the proviso is otiose. He says that the last part of the proviso refers merely to functions imposed under various Public Health and Local Government Acts—such functions, for example, as watering and scavenging the highways. I am unable to give such a narrow construction to the language of the proviso. It seems to me to contemplate that there were functions (for example, land drainage functions) exercisable by rural district councils as successors to the highway boards which were not functions with respect to highways, and to enact that such functions should not pass to the county councils.

In my view, it is possible to see how the first part of the proviso may have been inserted having regard to the last words in the main part of the subsection, "and rural district councils "shall cease to be highway authorities." Without the first part of the proviso it would perhaps have been possible to regard the duty imposed under section 26 of the Local Government Act, 1894, to prevent the obstruction of highways as part of the duties of a highway authority, and, accordingly, left in the air, since the rural district councils ceased to be the highway authorities, and the duty was manifestly not transferred to county councils.

The second part of the proviso is, however, in the most general terms and cannot, in my judgment, properly be given the narrow construction for which Mr. Scholefield contends.

Mr. Scholefield's second contention is that the duty to maintain and repair the drains is a function with respect to highways and is, therefore, not reserved to rural district councils under the proviso. This contention depends upon the true construction of the somewhat loose words "any functions not being functions "with respect to highways." By the awards, of which I understand there were about 4,000, made under various Enclosure Acts, the parish surveyors had certain functions cast upon them, some admittedly with respect to highways, and some relating to drains and ditches draining a great deal of the land in rural districts. Accordingly, the functions of the surveyors under these awards related mainly to highways, but partly also to land drainage. It is possible that one of the reasons why these latter functions were imposed upon the surveyors was that the highways at certain points might be affected by land drainage. There are, of course, road drains and gulleys whose main, if not whose only, function is to drain the highway. The repair of such drains and gulleys is, in my judgment, clearly a function with respect to highways. There are other drains and ditches whose function is solely to drain agricultural land, and which cannot in any way affect highways. The repair of such drains and ditches is equally clearly not a function with respect to highways. Then there are drains and ditches that affect both agricultural land and highways. Whether or not the function of maintaining and repairing these drains and ditches can properly be described as a function with respect to highways depends, in my view, on the degree to which the drains can be truly regarded as land drainage or road drainage.

In my judgment, the drains in question in this case are undoubtedly part of the land drainage scheme, and their non-maintenance and disrepair can affect only incidentally a small section of the highway within the parish of Holywell. I agree with the contention of Mr. Widgery that the true inference to be drawn in this case is that originally the duty to maintain and repair these drains was cast upon the surveyor, not because of their effect upon the highways but because, as they approached the parish of Holywell, they increased in breadth and depth, so that they became an important part of the land drainage in the parish and, as such, of general importance to the inhabitants. There were only four parish officers: the clerk, the constable, the overseer and the surveyor. The surveyor would appear to be the officer whose duties were most in line with the maintenance and repair of drains. I do not say that the fact that the non-repair of these drains might have had some effect upon certain sections of the highway was not a minor reason for selecting him rather than any of the other officers of the parish. I have not lost sight of the fact that in adjacent parishes, where the two drains in question did not run alongside or across highways, the duty to maintain and repair them was cast upon the riparian owners. I think that in those places the drains were so narrow and small that they could not be looked upon as of any importance to the inhabitants of the parish generally but as of limited importance, and that only to the riparian owners.

It follows that, in my judgment, the function of maintaining and repairing these drains in the parish of Holywell was not a function with respect to highways within the meaning of the proviso to section 30 (1), and, accordingly, was not transferred to the second defendants, but was reserved to the first defendants.

The next point that falls for decision is whether or not the defendants are liable to be sued for their failure to maintain and repair the drains. The defendants contend that the failure to maintain and repair the drains is non-feasance and that, accordingly, the plaintiff has no right of action in respect thereof. Highway authorities are clearly not liable in damages for any negligent non-repair of a highway, since the surveyor of highways was never personally liable for damages arising from mere omission to repair. No action at common law is or was maintainable against the parish for non-repair of the highways. The only remedy against the parish is by way of indictment. The Highway Act, 1835, merely enabled the parish to conduct its work through the surveyor. The duty to repair still remained and remains in the inhabitants at large. Accordingly, no action for non-repair of the highway is maintainable against the surveyor or against his successors, the present highway authorities: *Young* v. *Davis*.[1] This rule has long been established in our law, and no doubt has the soundest historical justification. It is, however, an archaic and anomalous survival into modern times. It would be difficult indeed to think of any sound reason why today highway authorities should enjoy this immunity. Nevertheless, there can be no doubt that in law they do enjoy the immunity, and I must apply the law; but I am not obliged to extend it.

In the present case I am being asked to extend it to the maintenance and repair of the drains in question. If these drains were designed to drain the highway, I should, as at present advised, feel myself bound, however reluctantly, to apply the rule. The situation is, however, very different. The only connection, and to my mind a very tenuous one, between the rule and the facts of the present case is that formerly the duty to maintain and repair the drains lay upon the highway authority. The immunity the highway authorities enjoy for the non-repair of highways is not out of any special tenderness which the law feels for highway authorities as such, but merely because the duty of repairing the highway fell upon them or was transferred to them as representatives of the inhabitants at large, and no action lay against the inhabitants at large. They could be proceeded against only by way of indictment: *Swain* v. *Southern Railway Co.*, *per* Finlay L.J.[2] In the present case the duty of repairing the drains was not originally upon the inhabitants at large, but was cast upon the surveyor by the award made under the Enclosure Act, 1800. Neither the inhabitants at large nor the surveyor were liable, nor are their successors liable, to be indicted in respect of their failure to maintain and repair the drains. I can see no reason for extending the immunity from liability for non-feasance to the defendants. *Sanitary Commissioners of Gibraltar* v. *Orfila*,[3] which is strongly relied upon by the defendants, seems to me to turn almost exclusively upon the construction of a local ordinance.

The only other question which remains for decision is whether the breach of duty to maintain and repair the drains gives the plaintiff a personal right to sue, or whether an action can be brought only by Her Majesty's Attorney-General on the relation of the plaintiff. The point for decision really turns upon whether it was the intention of the legislature to make the duty imposed

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[1] (1863) 9 L.T. 145.

[2] [1939] 2 K.B. 560, 574.

[3] (1890) 15 App.Cas. 400.

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one " which was owed to the party aggrieved as well as to the " State, or was a public duty only. That depends on the con" struction of the Act and the circumstances in which it was made " and to which it relates ": *Phillips* v. *Britannia Hygienic Laundry Co.*, *per* Atkin L.J.[4] In other words, the court must " consider " for whose benefit the Act was passed, whether it was passed in " the interests of the public at large or in those of a particular class " of persons ": *Groves* v. *Lord Wimborne*, *per* A. L. Smith L.J.[5]

In deciding this question one must look at the Act generally and consider, amongst other things, whether any penalty is provided for breach of the statutory duty. If a statutory duty is imposed and no remedy by way of penalty or otherwise is prescribed for its breach generally, a right of civil action accrues to the person who is damnified by the breach. " For, if it were not " so, the statute would be but a pious aspiration ": *Cutler* v. *Wandsworth Stadium Ltd.*, *per* Lord Simonds.[6]

In the present case the Enclosure Act, 1800, and the award thereunder imposed no penalty or other sanction for non-compliance with the duty to maintain and repair the drains, and I have come to the clear conclusion that the Act was passed and the award made for the benefit of the persons in favour of whom the enclosures were made, that is to say, for the persons whose land is immediately adjacent to the drains, and through whose land the drains pass. I am fortified in this conclusion by the last recital to the Act.

It follows, in my judgment, that the plaintiff is entitled against the first defendants to a declaration as prayed and to damages. The damages will be assessed by an official referee. In reaching his decision he will no doubt take into account, amongst other things, the extent to which the flooding of the plaintiff's land is attributable to the failure to repair the drains and maintain them in the breadth and depth specified in the award, and to the action (if any) which the plaintiff might reasonably have taken to mitigate his damage.

Judgment for the plaintiff against the first defendants.

Solicitors: *Fisher, Dowson & Wasbrough for Francis & Co., Cambridge; John J. McIntyre for Town Clerk, St. Ives; Sharpe, Pritchard & Co. for A. Case Aylward, Huntingdon.*

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[4] [1923] 2 K.B. 832, 841.

[5] [1898] 2 Q.B. 402, 407; 14 T.L.R. 493.

[6] [1949] A.C. 398, 407; 65 T.L.R. 170; [1949] 1 All E.R. 544.

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Lord Parker C.J., Hilbery, Donovan, Ashworth and Paull JJ.

Criminal Law—Plea—Fitness to plead—Burden of proof—Principles applicable—Hysterical amnesia causing loss of memory for events during period material to commission of crime — Mind otherwise normal — Whether able to make a "proper" defence — Whether "insane"—Criminal Lunatics Act, 1800 (39 *&* 40 *Geo.* 3, *c.* 94), *s.* 2.

Burden of Proof.

Criminal Law—Court of Criminal Appeal—Jurisdiction—Preliminary issue—Fitness to plead—Conviction—Whether right of appeal on preliminary issue—Criminal Appeal Act, 1907 (7 *Edw.* 7, *c.* 23), *s.* 19 (*a*).

Criminal Law—Court of Criminal Appeal—Reference by the Home Secretary—Consideration of court confined to ground of reference—Issue involved by necessary implication—Whether section 19 (*a*) *can give jurisdiction where convicted person would have no right of appeal—Criminal Appeal Act,* 1907, *s.* 19 (*a*).

The Criminal Lunatics Act, 1800, provides, by section 2: ". . . "if any person indicted for any offence shall be insane, and shall "upon arraignment be found so to be by a jury lawfully empanelled "for that purpose, so that such person cannot be tried upon such "indictment . . . it shall be lawful for the court . . . to direct "such finding to be recorded, and thereupon to order such person "to be kept in strict custody until His Majesty's pleasure shall be "known."

Before the arraignment of a defendant indicted for capital murder, counsel for the defence told the judge that he had evidence available raising the preliminary issue whether the defendant was fit to plead to the indictment on the ground that he had completely lost his memory for all events before the day after his arrest, and that the Crown would contest that preliminary issue. The trial judge ruled that it was for the defence to establish that the defendant was insane so as to be unfit to plead to the indictment, and that it was sufficient to discharge the burden if the defence could show on the balance of probabilities that he was unfit to stand his trial. The trial of the preliminary issue was taken in two stages, and in the first stage the jury empanelled to try it were required to answer the specific question: "Is the defendant now suffering "from a genuine loss of memory covering at least all the events "with which he was concerned between" certain dates material to the commission of the crime? After evidence had been given on both sides the judge directed the jury in accordance with his ruling and they returned the answer that the defendant was not suffering from genuine loss of memory. In the second stage the judge directed the jury that in view of their answer to the specific question, and in the absence of any other evidence pointing to the defendant's insanity, it was their duty to say that he was fit to stand his trial, and the jury brought in a verdict accordingly. The defendant was then tried on the charge of capital murder; he pleaded not guilty but was convicted and sentenced to death. The defendant did not appeal against his conviction, but a petition was submitted and the Secretary of State, being of the opinion that the "question of law "raised by the case, namely, whether the onus of proof on the issue "of fitness to plead rests on the prosecution or on the defence" ought to be considered by the Court of Criminal Appeal, referred the whole case to the court for determination under section 19 (*a*) of the Criminal Appeal Act, 1907.[1]

The defendant had relied solely on an hysterical amnesia preventing him from remembering events during the whole of the material period; there was no suggestion that his mind in other respects was not a normal mind, his case being that that defect in memory rendered him unable properly to instruct his advisers, with the consequence that he could not make a proper defence:—

Held, (1) that notwithstanding that the finding on the preliminary issue was not a conviction, the court had jurisdiction to hear and determine the case referred, since the defendant could have appealed to the court against his conviction on the ground that the hearing of the preliminary issue was open to objection in law in that the judge had misdirected the jury, so that he should never have been tried upon the substantive charge at all (post, p. 348).

Crane v. *Director of Public Prosecutions* [1921] 2 A.C. 299; 37 T.L.R. 788 applied.

Dictum of Darling J. in *Rex* v. *Jefferson* (1908) 24 T.L.R. 877, 878; 1 Cr.App.R. 95; 72 J.P. 467 questioned.

Quaere whether the court has jurisdiction to hear and determine a case referred under section 19 (*a*) of the Criminal Appeal Act, 1907, when the convicted person has no right of appeal against the finding complained of.

(2) That the following were the principles applicable to the onus of proof on the preliminary issue: (i) In all cases in which a preliminary issue as to the accused person's sanity was raised, whether contested or not, the jury should be directed to consider the whole of the evidence and to answer the question: "Are you "satisfied upon that evidence that the accused person is insane so "that he cannot be tried upon the indictment?"; (ii) if the contention that the accused was insane was put forward by the defence, and contested by the prosecution, there was a burden upon the

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[1] Criminal Appeal Act, 1907, s. 19, as amended by the Criminal Justice Act, 1948, s. 79 and Sch. 9: "Nothing in this Act shall affect the "prerogative of mercy, but the Secre- "tary of State on the consideration of "any petition for the exercise of His "Majesty's mercy, or of any repre- "sentation made by any other "person, having reference to the "conviction of a person on in- "dictment . . . may . . . either— "(*a*) refer the whole case to the Court "of Criminal Appeal, and the case "shall then be heard and determined "by the court . . . as in the case of "an appeal by a person convicted; or "(*b*) if he desires the assistance of "the court . . . on any point arising "in the case with a view to the deter- "mination of the petition, refer that "point to the court . . . for their "opinion thereon . . ."

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defence of satisfying the jury of the accused's insanity, which burden was discharged if the jury were satisfied on the balance of probabilities that the insanity was made out; and (iii) conversely, if the prosecution alleged, and the defence disputed, insanity, there was a burden upon the prosecution of establishing it. Accordingly, the trial judge's direction as to the onus of proof on the preliminary issue was right (post, pp. 350, 351).

Rex v. *Dyson* (1831) 7 C. & P. 305; *Rex* v. *Pritchard* (1836) 7 C. & P. 303; *Reg.* v. *Turton* (1854) 6 Cox C.C. 385, and *Russell* v. *H.M. Advocate*, 1946 S.C.(J.) 37 approved.

Ley's Case (1828) 1 Lewin 239; *Reg.* v. *Davies* (1853) 3 C. & K. 328, and *Reg.* v. *Sharp* (1957) post, p. 357; [1958] 1 All E.R. 62; 41 Cr.App.R. 197 overruled.

(3) That the question as to the onus of proof on the preliminary issue could only arise if the alleged amnesia could in law bring the defendant within the scope of section 2 of the Criminal Lunatics Act, 1800, so that in considering the legal effect of amnesia the court was considering a matter involved by necessary implication in the specific question referred ~~(post, p. 349)~~.

Reg. v. *Caborn-Waterfield* [1956] 2 Q.B. 379; [1956] 3 W.L.R. 277; [1956] 2 All E.R. 636 applied.

(4) That, although the word "insane" in section 2 of the Criminal Lunatics Act, 1800, had in practice been extended to include persons who were not insane within the M'Naughten Rules but who by reason of some physical or mental condition could not follow the proceedings at the trial and so could not make a proper defence, it could not be extended to include persons who were mentally normal at the time of the proceedings and were capable of instructing their solicitors as to what submission was to be put forward with regard to the commission of the crime. The defendant could plead to the indictment and had the physical and mental capacity to know that he had the right of challenge and to understand the case as it proceeded, and, therefore, the loss of memory, even if genuine, would not of itself have rendered the defendant insane so that he could not be tried upon the indictment (post, p. 356).

Direction of Alderson B. in *Rex* v. *Pritchard*, 7 C. & P. 303, 304, and *Russell* v. *H.M. Advocate*, 1946 S.C.(J.) 37 applied.

REFERENCE by the Home Secretary under section 19 (*a*) of the Criminal Appeal Act, 1907.

On September 10, 1959, Gunter Fritz Erwin Podola, "the "appellant," appeared before Edmund Davies J. at the Central Criminal Court on a charge of capital murder. Before arraignment counsel for the appellant told the judge that he had available and desired to call evidence which raised the preliminary issue whether he was fit to plead to the indictment, it being his case that he was suffering from hysterical amnesia and had completely lost his memory for all events before July 17, 1959, the day after his arrest, and that the Crown would contest the preliminary issue. Argument was then addressed to the court as to whether the burden of proof in that issue rested on the prosecution or the defence.

The following cases were referred to during the course of legal submissions in relation to the procedure and the burden of proof on the preliminary issue: *Reg.* v. *Roberts*[2]; *Reg.* v. *Sharp*[3]; *Reg.* v. *Davies*[4]; *Reg.* v. *Turton*[5]; *Rex* v. *Carr-Briant*[6]; *Reg.* v. *Bourne*[7]; *Reg.* v. *Harris*[8]; *Reg.* v. *Dudley and Stephens*[9]; *Reg.* v. *Naylor*[10]; *Ley's Case*[11]; *Hill* v. *Baxter*[12]; *Harrod* v. *Harrod*[13]; *Woolmington* v. *Director of Public Prosecutions*[14]; and *Russell* v. *H.M. Advocate.*[15]

EDMUND DAVIES J. A preliminary issue is raised in this case in relation to the fitness of the accused man to plead to the indictment and to stand his trial thereupon. The first issue that is thereby raised is as to where the burden of proof lies; in other words, is it for the prosecution to establish that the accused man is fit to stand his trial, or is it for the defence to establish unfitness to stand his trial?

Counsel for the defence, to whose submissions, like those of counsel for the Crown, this court is greatly indebted, desires to call, in the first place, evidence as to unfitness, but he urges that, although he desires to do that, there is no burden upon the defence at all—the burden is wholly the other way. Unhappily the authorities on this matter are conflicting, and have occupied a great deal of time, but certainly no excessive time, today. I do not propose to go through the authorities again for the purposes of this ruling, but as recently as 1957, in *Reg.* v. *Sharp,*[16] the matter came before Salmon J. on circuit. Although Mr. Maxwell Turner, for the Crown, has submitted that the reports are in some respects unsatisfactory and that it is not easy to explain exactly what the judge did decide in that case, I for my part have no doubt, and I have taken steps to make some inquiries, that the judge did in fact rule that the burden of proof upon this issue was upon the Crown. A decision so recently given and, if I may be allowed to say so, by so exalted a member of the bench, is one which must command and certainly does receive from this court the profoundest respect. That was not the first decision in which it had been so held; there are in fact decisions both ways.

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[2] [1954] 2 Q.B. 329; [1953] 3 W.L.R. 178; [1953] 2 All E.R. 34.

[3] (1957) post, p. 357, note; [1958] 1 All E.R. 62.

[4] (1853) 3 C. & K. 328.

[5] (1854) 6 Cox 385.

[6] [1943] K.B. 607; [1943] 2 All E.R. 156.

[7] (1952) 36 Cr.App.R. 125.

[8] (1897) 61 J.P. 792.

[9] (1884) 14 Q.B.D. 273.

[10] (1865) L.R. 1 C.C.R. 4.

[11] (1828) 1 Lewin 239.

[12] [1958] 1 Q.B. 277; [1958] 2 W.L.R. 76; [1958] 1 All E.R. 193.

[13] (1854) 1 K. & J. 4.

[14] [1935] A.C. 462; 51 T.L.R. 446.

[15] 1946 S.C.(J.) 37.

[16] (1957) post, p. 357, note; [1958] 1 All E.R. 62; 41 Cr.App.R. 197.

I come back to this: there is no doubt that it is well-established law that where an accused person is charged with a crime, and it is sought on his behalf to establish that at the time of the commission of the alleged offence he was suffering under such a mental defect as to justify and call for a verdict of guilty but insane, it is for the defence to call evidence and establish that defence, to establish it on the balance of probabilities. That matter was dealt with by section 1 of the Criminal Lunatics Act, 1800, now replaced by section 2 of the Trial of Lunatics Act, 1883. Section 2 of the Act of 1800 deals with the matter upon which this court is now engaged, namely, as to the capacity of the accused to plead on arraignment. It uses the word "insane," the wording so far as it is relevant in the section being: "If any "person indicted for any offence shall be insane, and shall upon "arraignment be found so to be by a jury . . ."

I cannot myself see any reason in law, logic or fairplay why the approach to the application of those two sections contained in the same Act of Parliament should be different. I asked Mr. Lawton if he could point to any rational distinction which would lead to a different approach in the one case from the approach adopted in the other. Mr. Lawton submitted such considerations as occurred to him, but for my part I can see no valid distinction to be drawn between the two. It is not necessary, I repeat, for me to go through the whole of the authorities. I differ from Salmon J. with extreme reluctance, but having had the inestimable advantage of having all the authorities which appear to be available cited to me and exhaustively dealt with by counsel, that is my conclusion. I rule, accordingly, upon this preliminary issue that it is for the defence to establish that the accused man is insane so as to be unfit to plead to this indictment.

It must be understood, and indeed it is a matter of common agreement between counsel, that whereas if the burden of proving fitness were upon the Crown, the Crown would have to establish it in accordance with the ordinary standards of proof in criminal trials, namely, beyond all reasonable doubt, the burden which is cast upon the defence in accordance with the ruling which I have just enunciated is of a different order. In my judgment, therefore, it is sufficient for the defence to discharge the burden if they can show on balance of probabilities that the accused man is unfit to stand his trial.

The trial of the preliminary issue then proceeded, and the jury empanelled to try it was required, in the first stage, to answer the specific question: "Is the defendant now suffering from a "genuine loss of memory covering at least all the events with "which he was concerned between July 1, 1959, and the time "of his arrest on July 16?," it being left for the judge to rule whether, if the jury found a genuine amnesia, that would bring the appellant within the scope of section 2 of the Criminal Lunatics Act, 1800. Witnesses (including the appellant himself) were called, and evidence given on behalf of both sides.

During the course of his summing-up to the jury on the specific question the judge said: "Of course, it is not only the "community as a whole that has to be considered in this matter. "There is most certainly to be borne in mind throughout that "member of the community who is the accused man himself, "and it is a cardinal principle of our criminal law that no man "may be brought to trial upon any criminal charge unless and "until he is mentally capable fairly of standing his trial . . . "; and: "The only matter that you have to decide is: Is he now "unfit to take his trial? and as a preliminary issue to that: Is "the loss of memory which is claimed here established? It "matters not, except in so far as you find it of assistance at the "present time, what his state of mind was two months ago, or "two weeks ago. It is: Is he now fit to stand his trial? Now "under our law every man is presumed to be sane until the "contrary is proved, and I direct you, for the purposes of this "trial, that the presumption of sanity includes a presumption "that the accused person who is charged is fit to undertake to "stand his trial upon the charge. That is the presumption with "which one begins this case. I further direct you . . . as a "matter of law that here, where the accused alleges and it is "asserted on his behalf that he is for some reason or other unfit "to stand his trial, it is for the accused to prove it and not for "the Crown to disprove it. The accused has on the balance of "probabilities to establish that in fact he ought not to stand "his trial now because of his unfitness. He does not have to "establish that matter beyond all reasonable doubt. He has to

" establish it; he has to prove it; he has to satisfy you, and each " and every one of you, that, to use the analogy of a pair of scales " (which is so frequently used in these cases) the scales have " gone down in his favour. And, members of the jury, if your " state of mind, having heard the whole of this evidence, is that " on balance it has been shown that this man has lost his memory " in the way that I shall remind you about and as is alleged, you " will say so. On the other hand, if your conclusion is that the " scales remain evenly balanced, or even more, if your view is " that the scales are tipped against the accused, having heard the " whole of the evidence, you will say that the alleged unfitness " of the accused man is not established."

Later, towards the close of the summing-up, the judge (after referring to the views of medical witnesses) said: " Which of the " views is right? Or rather, to put this matter in its correct " way: Has the whole of the evidence in this case, medical and " non-medical, satisfied you that the probability is that this man " is suffering from hysterical amnesia, the loss of memory, which " is claimed? If on balance you think that the answer to the " question is 'Yes, the defence have proved it,' then you will " say so. If on the other hand your view on the whole of it is " that the burden of proof which is upon the defence has not " been discharged by the defence, you will answer the question " which is now before you in the negative."

After they had retired for some three and a half hours the jury sought clarification of the judge's closing remarks and asked: " Is the onus on the defence to prove beyond reasonable doubt " that the defendant is suffering from loss of memory for the " period in question?" The judge said: " . . . In criminal " matters where the burden of proof is on the Crown, the Crown " has to prove the essential matters beyond all reasonable doubt. " In criminal matters where a burden is cast upon the defence, " the burden is a lesser burden of proving that on the balance of " probabilities what the defence have to prove has been established. In this case, as I have directed you, it is for the " defence to establish the alleged loss of memory. They have to " prove it, accordingly, not beyond all reasonable doubt but on " the balance of probabilities. But, of course, they have to " prove it, and if they have not proved it you say so and you " reject what is alleged. On the other hand, if on the balance " of probabilities they have established it, then you say so."

The jury, having retired again, returned the answer that the appellant was not suffering from genuine loss of memory. The judge directed them [17] that, in view of their answer to the specific question and in the absence of any other evidence of insanity, it was their duty to say that the appellant was fit to stand his trial, and the jury returned a verdict accordingly. The trial on the charge of capital murder then proceeded and the appellant pleaded not guilty but was convicted and sentenced to death.

The appellant did not appeal against his conviction, but a petition was submitted, and the Home Secretary, being of the opinion that a question of law raised by the case, namely, whether the onus of proof on the issue of fitness to plead rested on the prosecution or on the defence, which he understood had been the subject of different rulings by judges of the High Court, ought to be considered by the Court of Criminal Appeal, referred the whole case to the court for determination under section 19 (*a*) of the Criminal Appeal Act, 1907.

Sir Reginald Manningham-Buller Q.C., A.-G. and *J. R. Cumming-Bruce* as amici curiae. There is an apparent difficulty as to the jurisdiction of the court to entertain this reference. Under section 3 of the Criminal Appeal Act, 1907, " a person convicted " on indictment " may appeal to the court " against his convic- " tion " or the sentence passed on his conviction. A reference under section 19 (*a*) does not enlarge the court's jurisdiction, and it can only hear and determine the reference when the person convicted would have had a right of appeal to the court: see the requirement in that paragraph that the court shall hear and determine the case " as in the case of an appeal by a person " convicted," and rule 48 of the Criminal Appeal Rules, 1908 [S.R. & O. 1908, No. 277 (L. 6)], under which a petitioner under section 19 (*a*) " shall be deemed to be for all the purposes of the " Act or these rules a person who had obtained from the Court " of Appeal leave to appeal ": see, also, the distinction between " the whole case " referred under paragraph (*a*) and " that point " referred under paragraph (*b*) of section 19, and *Rex* v. *Johnson.*[1] Views have been expressed that there is no right of appeal against a finding of fitness to plead, and, if they are correct, there is no jurisdiction in respect of this reference. In *Rex* v. *Jefferson*[2] Darling J. said,[3] as a ruling of the court, that the Act only gave leave to appeal against a conviction, and " How can you say that " a finding that a person is fit to plead is a conviction? " In *Rex* v. *Larkins*[4] it was held that a person found to be insane and unfit to plead had not been " convicted on indictment " within section 3 of the Act of 1907, and that, therefore, no appeal lay to the court; and in *Felstead* v. *The King*[5] there was a similar holding in respect of a special verdict of guilty but insane. But where there has been a mistrial followed by a recorded conviction there is a right of appeal: *Crane* v. *Director of Public Prosecutions*,[6] in particular *per* Lord Sumner[7] and Lord Parmoor,[8] and it is submitted that the appellant here had a right of appeal against his conviction under section 3 of the Act on the ground of mistrial; on the assumptions that there was misdirection as to onus of proof and that the amnesia alleged could and did amount to unfitness to plead, it would have been open to him to contend on appeal that he should never have been called upon to plead, and that, having pleaded and been convicted, there was a mistrial.

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[17] During the absence of the jury legal submissions were made as to the effect in law of amnesia, on which, in view of the finding of the jury, no ruling was given.

[1] [1909] 1 K.B. 439; 25 T.L.R. 229.

[LORD PARKER C.J. But what of the opposite case where the prosecution allege and the defence unsuccessfully dispute unfitness to plead, when there would be no conviction and no right of appeal?]

Any anomaly is a result of the wording of the Act, and such a case would be analogous to the case of a verdict of guilty but insane, as in *Felstead* v. *The King*.[9] Where there has been a conviction, there is a right of appeal, and on the hearing of the appeal it is open to an appellant to say that there was a mistrial. A mistrial may take a variety of forms; for example, where a plea is wrongly construed as a plea of guilty; where, after a plea of not guilty, there is a change of plea and no verdict is taken from the jury; or where the court is improperly constituted: see *Rex* v. *Wakefield*,[10] where one of the jurors was personated by his bailiff; *Rex* v. *Williams*,[11] where the defendant was wrongly

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[2] (1908) 24 T.L.R. 877; 1 Cr. App.R. 95; 72 J.P. 467.

[3] 24 T.L.R. 877, 878.

[4] (1911) 27 T.L.R. 438; 6 Cr. App.R. 194.

[5] [1914] A.C. 534; 30 T.L.R. 469.

[6] [1921] 2 A.C. 299; 37 T.L.R. 788 (sub nom. *Rex* v. *Crane*).

[7] [1921] 2 A.C. 299, 331, 332.

[8] Ibid. 336.

[9] [1914] A.C. 534.

[10] [1918] 1 K.B. 216; 34 T.L.R. 210.

[11] (1925) 19 Cr.App.R. 67.

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denied his right to challenge a juror; and *Rex* v. *Cronin*,[12] where an unqualified person was appointed to act as deputy recorder.

[HILBERY J. In such cases there was an irregularity in the course of the trial. Is there any case in which it has been held that there was a mistrial by reason of the finding at a preliminary inquiry?]

No, but in some of those cases the irregularity occurred before the trial. The issue of fitness to plead is part of the record here and it is difficult to see how it can be said not to have formed part of the proceedings. Although not itself a plea in bar, it is very similar, and it comes into the same category as the pleas of autrefois convict and autrefois acquit, which are raised before the start of the trial; although there is not yet a plea, they are part of the trial: there is a trial within a trial. When there has been some irregularity, not necessarily occurring during the trial, but sometimes before it begins, this court has never considered itself as powerless to interfere, and it has assumed jurisdiction in cases of pleas of autrefois convict and autrefois acquit: *Rex* v. *Barron*[13] and *Rex* v. *Thomas*.[14]

[LORD PARKER C.J. If the court has jurisdiction in this case, either *Rex* v. *Jefferson*[15] or *Rex* v. *Johnson*[16] must be wrong.]

It is submitted that *Rex* v. *Johnson*[16] is right, and that Darling J. in *Rex* v. *Jefferson*[17] was merely saying that the Act was limited to appeals against conviction: if the ruling went any further than that, or was seeking to restrict the matters which can be raised on an appeal against conviction, it is inconsistent with the principles in *Crane* v. *Director of Public Prosecutions*[18] and is wrong. That there is no direct appeal against a preliminary finding does not mean that a convicted person is not entitled to appeal on the ground of mistrial and to say that he ought not to have been required to plead, and he may say so for varying reasons.

F. H. Lawton Q.C. and *R. J. S. Harvey* for the appellant. On the true construction of section 19 the court has power under this reference to review all the proceedings at the Central Criminal Court. *Rex* v. *Johnson*[19] should be distinguished. The court was not there concerned with a conviction at all, but with a

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[12] (1940) 56 T.L.R. 457; [1940] 1 All E.R. 618.

[13] [1914] 2 K.B. 570; 30 T.L.R. 422; 10 Cr.App.R. 81.

[14] [1950] 1 K.B. 26; 65 T.L.R. 586; [1949] 2 All E.R. 662.

[15] 24 T.L.R. 877.

[16] [1909] 1 K.B. 439.

[17] 24 T.L.R. 877, 878.

[18] [1921] 2 A.C. 299.

[19] [1909] 1 K.B. 439.

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petitioner who had been convicted at petty sessions as an incorrigible rogue and committed to quarter sessions for sentence: since quarter sessions had no jurisdiction in regard to the conviction, the reference could not give this court jurisdiction, and all that it could do was supervise the sentence. But in this case the reference is concerned with a conviction; the Home Secretary has referred "the whole case" to the court and the court has a duty to inquire into the preliminary issue. The difference in the wording of the two paragraphs of section 19 is significant. Paragraph (*a*) refers to the "whole case." "Case" is not a word of art and on its ordinary meaning must include everything which happened at the Central Criminal Court, including the preliminary inquiry. [Reference was also made to *Reg.* v. *Caborn-Waterfield.*[20]]

[LORD PARKER C.J. The "whole case" in paragraph (*a*) may be used in contradistinction to the "point" referred under paragraph (*b*).]

On a reference under paragraph (*b*) the court offers an opinion to the Home Secretary, whereas under paragraph (*a*) there is a judicial decision. It may well be that in a matter such as this the Home Secretary does desire a judicial decision of this court. If this reference were under paragraph (*b*), and it was desired to take the matter further, the Attorney-General might not be able to give his fiat.

But the appellant here had a right to appeal in respect of the preliminary finding, and the argument of the Attorney-General to that effect is supported. There is, however, a possible difficulty, in that misdirection on a preliminary issue might not necessarily vitiate the whole trial; there are indications that an irregularity only amounts to a mistrial when there has been an omission of a material step in procedure or something has been done whereby the trial court had no jurisdiction. Further, should the appellant succeed, the court would have no power to deal with the situation unless it could be said to be a mistrial, and would have no alternative but to quash the whole conviction. [Reference was also made to *Rex* v. *Cohen and Bateman,*[21] *Rex* v. *Haddy*[22] and *Stirland* v. *Director of Public Prosecutions.*[23]] It is submitted, however, that the court should entertain this reference: it is true that the finding on the preliminary issue is not a conviction, but the appellant is entitled to say that, because of a wrong step taken before arraignment, he never should have been arraigned. The reports of *Rex* v. *Jefferson*[24] are unsatisfactory; a full court has power to overrule that case and the court is asked to do so.

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[20] [1956] 2 Q.B. 379; [1956] 3 W.L.R. 277; [1956] 2 All E.R. 636.

[21] (1909) 2 Cr.App.R. 197.

[22] [1944] K.B. 442; 60 T.L.R. 253; [1944] 1 All E.R. 319.

[23] [1944] A.C. 315; 60 T.L.R. 461; [1944] 2 All E.R. 13.

Sir Reginald Manningham-Buller Q.C., A.-G. The words "having reference to the conviction of a person on indictment" in section 19 should not be given a narrow limited meaning. Persons who feel themselves to have been prejudiced by some mistake or error in preliminary proceedings in the trial court should not be shut out from access to this court. It is submitted that the reference was correctly made under paragraph (*a*), but should the court reach the conclusion that it should have been made under paragraph (*b*), another reference could no doubt be made in that form. It is desirable that the decision on this matter should have the force of a judgment of this court; either side may wish to take the matter further and there would be no power to grant a fiat on an advisory opinion given under paragraph (*b*).

Counsel for the appellant was then asked to proceed with his submissions.

Lawton Q.C., for the appellant, referred to *Rex* v. *Rivett*[25] and *Reg.* v. *Sharp*.[26] The judge misdirected the jury as to the burden of proof on the issue of fitness to plead. The common law required not a trial but an inquiry as to the accused person's fitness to plead. One side did not allege and the other refute, but it was essentially an inquiry for the guidance of the court, and there was no question as to the burden of proof. The problem underlying the old cases and statutes was that of the accused person who sought to evade justice by feigning madness. If the burden of proof was on the Crown and the jury found him fit to plead, then clearly he had been proved to be shamming; but if it was for the defence to prove insanity, the effect of that verdict might merely be not proven, a most unsatisfactory basis for beginning the trial. Up to the eighteenth century felons had no right to be represented by counsel except on an issue of law, so that there was no one to raise the question of fitness to plead and it was for the court to draw attention to insanity. If there was any doubt, the trial could not proceed: see Hale's Pleas of the Crown, vol. 1, p. 34. It appears that that was so because a person could not be dealt with or executed unless he was in a fit condition to repent and confess his sins. In Hawkins' Pleas of the Crown, c. 1, s. 4, it is said: "And by the common law, "if it be doubtful whether a criminal who at his trial is in appear-"ance a lunatic, be such in truth or not, it shall be tried by an "inquest of office" and "If it be found by them that the party "only feign himself mad . . . he shall be dealt with as one that "stands mute." Further, it seems that there was a presumption, which it was for the Crown to rebut, that a person standing mute was mute by the visitation of God: see *The King* v. *Steel.*[27] The emphasis was that it must be "found" that the madness was feigned. [Reference was also made to the ruling of Hullock B. in *Ley's Case.*[28]] Section 2 of the Criminal Lunatics Act, 1800, again, uses the words "shall . . . be found" to be, not "proved to be," insane, and it is submitted that that section must be read in the light of its historical background and construed as embodying the common law.

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[24] 24 T.L.R. 877.

[25] (1950) 34 Cr.App.R. 87.

[26] (1957) post, p. 357, note.

[LORD PARKER C.J. The issue can arise in a number of ways: the appearance of the accused person may be such that both sides agree that he is insane, or the defence may assert insanity and the Crown deny it; equally, it may be asserted by the Crown and denied by the defence. But in whatever way it arises, must not the direction to the jury be "Are you satisfied "that he is insane?"]

The jury must "find" him insane on a proper direction. They can only "find" with certainty if the burden of proof is on the prosecution; it would be most unfortunate if a trial were to proceed merely because the defence had not proved enough.

The cases in which the view was taken that it was for the prosecution to establish fitness to plead are not inconsistent with the Act. Reliance is placed on *Ley's Case*,[29] *Reg.* v. *Davies*[30] and *Reg.* v. *Sharp*,[31] which are all in favour of the submission for the appellant. [Reference was also made to Halsbury's Laws of England, 3rd ed., vol. 10, p. 403.] It does not appear from the direction of Alderson B. in *Rex* v. *Pritchard*[32] that the burden was cast on the defence; and in *Rex* v. *Dyson*[33] there was no doubt that it was on the Crown. *Reg.* v. *Davies*[34] appears to be in conflict with *Reg.* v. *Turton*,[35] but it is the only case, apart from this, in which the issue was raised by the defence and contested by the Crown. On an analysis of the authorities it would be illogical to place the burden of proof on the person raising the issue. In *Russell* v. *H.M. Advocate*[36] the Scottish court treated the issue as a plea-in-bar, which it would be for the defence to prove; Scottish law differs from English law in this respect, for it is not a plea-in-bar but an inquiry for the court.

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[27] (1787) 1 Leach C.C. 451.

[28] (1828) 1 Lewin 239, 240.

[29] 1 Lewin 239.

[30] (1853) 3 C. & K. 328.

[31] Post, p. 357, note.

[32] (1836) 7 C. & P. 303, 304, 305.

[33] (1831) 7 C. & P. 305.

[34] 3 C. & K. 328.

This is not an exculpatory matter, but the justice of it is that a person should not be tried unless he is in a fit condition to defend himself: see *Rex* v. *Dashwood*.[37] [Reference was also made to *Rex* v. *Governor of Stafford Prison, Ex parte Emery*,[38] *Reg.* v. *Roberts*[39] and *Reg.* v. *Beynon*.[40]]

[LORD PARKER C.J. On one view the point just argued would be enough to dispose of the case. On another view the question whether amnesia can amount to unfitness to plead would become relevant. Can the Attorney-General assist the court as to the best course to take?]

Sir Reginald Manningham-Buller Q.C., A.-G. There can be no doubt that the Home Secretary would be glad if the court did consider the second point. There was no decision as to it in the court below on which an appeal could be brought, but on one view it would be involved as a necessary consequence of the point referred, and it is so much bound up with it that no hesitation is felt in asking the court to deal with it.

[LORD PARKER C.J. We would like to hear the submissions for the appellant on the second point.

Lawton Q.C. The case for the applicant was that he had no memory at all for any events which occurred during the material time; if that be established it is submitted that, whatever view be taken of the burden of proof, he was not fit to stand his trial. The concept of insanity involves a disturbance of a whole mind. "Insane" in section 2 of the Criminal Lunatics Act, 1800, does not mean insane at large but is qualified by the words "so that "such person cannot be tried upon such indictment." The word must be construed with reference to whether the accused person can or cannot be tried upon the indictment: *Rex* v. *Governor of Stafford Prison, Ex parte Emery*.[41] The test is: Can he stand his trial? In *Reg.* v. *Kemp*[42] Devlin J. commented[43] that insanity under section 2 "has been given a very wide meaning "indeed." [Reference was also made to paragraph 220 of the Report of the Royal Commission on Capital Punishment, (1953) [Cmd. 8932].] Devlin J. also commented[44] on the sense in which "mind" is used in the M'Naughten Rules, and included memory as one of the factors, saying that it was irrelevant whether a condition was curable or incurable, transitory or permanent. It is appreciated that those observations were directed primarily to insanity as an answer to responsibility, but it is submitted that the approach is the same in relation to a plea on arraignment of unfit to plead. If in fact there was a failure of memory to the extent alleged here, it does not matter if the memory will return the next day. The question is: Is there, at the time of the plea, such a disturbance of mind to result in such loss of memory? If there is, it does not mean that the accused person will escape trial: if and when he recovers his memory, the trial can proceed.

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[35] (1854) 6 Cox 385.

[36] 1946 S.C.(J.) 37; 1946 S.L.T. 93.

[37] [1943] K.B. 1, 4.

[38] [1909] 2 K.B. 81.

[39] [1954] 2 Q.B. 329; [1953] 3 W.L.R. 178; [1953] 2 All E.R. 34.

[40] [1957] 2 Q.B. 111; [1957] 2 W.L.R. 956; [1957] 2 All E.R. 513.

[41] [1909] 2 K.B. 81.

The tests laid down by Alderson B. in *Rex* v. *Pritchard*[45] are not conclusive by themselves. It must always be a question of degree, and although it is no doubt true to say that the appellant knew that he had a right of challenge, and was able to, and did, follow the trial with the greatest interest, that does not mean that he was "of sufficient intellect to comprehend the course "of proceedings on the trial, so as to make a proper defence." To do that he must have a memory into which he can fit the evidence given. As to what amounts to making a proper defence, see the direction of Lord Dunedin, Lord Justice-General, in *H.M. Advocate* v. *Brown*,[46] that insanity under section 87 of the Lunacy (Scotland) Act, 1857 (which is in similar terms to section 2 of the Act of 1800), "means insanity which prevents "a man from doing what a truly sane man would do and is "entitled to do—maintain in sober sanity his plea of innocence, "and instruct those who defend him as a truly sane man would "do," and that a person giving those instructions "should not "only intelligently but without obliteration of memory as to "what has happened in his life, give a true history of the "circumstances of his life at the time the supposed crime was "committed." Lord Dunedin also told[46] the jury that it was their duty to say whether the accused person was in the condition of a truly sane man who could not only tell his counsel how to defend him but "can tell his counsel, with the certainty of not "being deceived, what he was really doing at the time during "which the act is said to have been committed." Although *H.M. Advocate* v. *Brown*[47] was criticised in *Russell* v. *H.M. Advocate*,[48] it was not overruled and is in line with *Reg.* v. *Berry*[49] and *Reg.* v. *Roberts*.[50] See also *H.M. Advocate* v. *Robertson*,[51] where a defendant who had one fixed delusion but was able to challenge the jurors and was otherwise a sane man was nevertheless found to be insane within section 87 of the Act of 1857. [Reference was also made to *Reg.* v. *Beynon*.[52]]

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[42] [1957] 1 Q.B. 399; [1956] 3 W.L.R. 724; [1956] 3 All E.R. 249.

[43] [1957] 1 Q.B. 399, 404.

[44] Ibid. 407.

[45] 7 C. & P. 303, 304.

[46] 1907 S.C.(J.) 67, 77, 78.

A man with full control of all his faculties can give instructions to his advisers about his personal history and past events, but where, owing to a disturbance of the mind, there is a loss of memory as to the facts in issue in the indictment, he cannot do so; he is prevented from putting a part of his case and is not in a position to put forward a proper defence. He does not know what defence to put forward. That is particularly so in the case of an indictment for murder, because there are various special defences, e.g., provocation or accident, of which there must be evidence, which can only come from the defence, before the court will allow them to go to the jury. Those defences are dependent upon the accused person being able to instruct his counsel: it is impossible to cross-examine as to provocation without instructions, and the conduct of the defence is faced with a real and practical difficulty. The case for the prosecution on the depositions has to be accepted; witnesses may not be telling the truth, or may be mistaken, but he cannot tell his counsel what the true facts are or what evidence there is. As it was, the attention of the jury was called to the possibility of accident, but they could not be asked to consider provocation, because the court would have ruled, rightly, that there was no evidence of provocation and the jury could not consider it. The essence of a criminal trial is that the defendant should be able to put all the facts before the court, but if he has lost his memory for the relevant period he cannot instruct his counsel as to what the facts are and is thereby deprived of the possibility of putting forward a defence which might be available to him. As in the case of a deaf mute, a man who has lost his memory cannot make his view of the matter known.

[47] 1907 S.C.(J.) 67.

[48] 1946 S.C.(J.) 37.

[49] (1876) 1 Q.B.D. 447.

[50] [1954] 2 Q.B. 329.

[51] (1891) 3 White 6.

[52] [1957] 2 Q.B. 111.

[LORD PARKER C.J. Do you go so far as to say that a man who says he cannot remember what happened because he was drunk cannot be tried?]

No, there is a distinction at common law between that which is brought about by a man's own act and by the visitation of God.

The Act of 1800 is declaratory of the common law, and the court must look to see what the common law approach was. The old phrase used was "in sana memoria"; "memoria" means memory, not mind, while "sana" means sound, and a man could not be tried unless he had a good and "sound memory": see Hale's Pleas of the Crown, vol. 1, pp. 34–35. That was a factor of insanity, and anyone who did not have it was "insane" and unfit to plead. The emphasis on a "good and sound" memory runs through the law on this matter: see *Beverley's Case.*[53] [Reference was also made to *Somervile's Case.*[54]] Sir John Hawles in his remarks on the trial of Charles Bateman [*Bateman's Case*] said[55] that the true reason of the law was that "a person of 'non sana memoria', and a lunatick during his "lunacy, is by an act of God . . . disabled to make his just "defence. There may be circumstances lying in his private "knowledge, which would prove his innocency, of which he can "have no advantage, because not known to the persons who shall "take upon them his defence," and criticised the "cruel and "inhumane law" 33 Hen. 8, c. 20, enacting, inter alia, that a man who fell mad after he committed high treason should notwithstanding be tried, but repealed by 1 & 2 Philip and Mary, c. 10, so that the law was as it was at common law, and if Bateman was of "non sanae memoriae he ought not to have been "tried, much less executed." It is submitted that the use of the word "insane" as qualified in section 2 of the Act of 1800 has made no difference in the law, and reliance is placed on the views of the early common lawyers. *Russell* v. *H.M. Advocate*[56] at first sight seems to be against the argument for the appellant, but even in that case it was said that loss of memory may be an important element in leading to the conclusion that the accused was insane. Furthermore, there are difficulties in the application of that case: Lord Cooper, Lord Justice-Clerk, said[57] that loss of memory in the accused increased the onus on the Crown, but

[53] (1603) 4 Co.Rep. 123b, 124b.

[54] Anderson 104 [No. CLIV].

[55] (1685) 11 State Trials 467, 474, 476.

[56] 1946 S.C.(J.) 37.

[57] Ibid. 48.

there is no rule of English law whereby, if a certain defence be put forward, the onus on the Crown can be increased.

Maxwell Turner and *J. H. Buzzard* for the Crown. The proper direction to the jury on a preliminary issue of fitness to plead is to ask them whether they are satisfied that the defendant is insane so that he should not be tried. In this case, where the defence was seeking to establish, and the Crown refuting, unfitness to plead, it was not a misdirection to say that the onus was on the defence to establish loss of memory on the balance of probabilities as a preliminary to establishing unfitness to plead.

[LORD PARKER C.J. We need not trouble you on that point. We would like to hear you on the second point, since the first point may be irrelevant if hysterical amnesia cannot amount to insanity within the section.]

The matter can also be put the other way and it can also be said that if the jury were properly directed on the first point the second would not arise.

There are so many different types of amnesia and different symptoms that each case must depend to a great extent on the amnesia alleged, but, generally, it is submitted that although loss of memory may be a symptom or ingredient of insanity (see *Russell* v. *H.M. Advocate* [58]), mere loss of memory is not in itself a ground for a verdict of unfit to plead. The passage from Hale's Pleas of the Crown, vol. 1, pp. 34–35, relied on for the appellant, is not directed to loss of memory, but to insanity as a whole, and "memory" there must be read as "mind." The remarks on *Bateman's Case* [59] were written before the Act of 1800 and do not assist the court in this case. Section 2 of the Act contemplates real insanity or madness. It is true that insanity in relation to fitness to plead has been extended in both England and Scotland to apply to deaf mutes and to those who are unable to communicate with others, but the court is here being asked to extend it very much further than has been done in any case. There is no case in England in which it had been argued that a defendant who is otherwise sane and normal is unfit to plead by reason of amnesia relating to the time of the commission of the offence. If the argument for the appellant were right, it would lead to an impossible situation: it would of necessity extend to cases of drunkenness, and in every case in which a defendant said that he was unable to remember what happened because he was drunk a jury would have to be empanelled to try whether he was fit to plead.

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[58] 1946 S.C.(J.) 37.

[59] 11 State Trials 467, 474, 476.

The appellant is within the criteria laid down in *Rex* v. *Pritchard*.[60] He was of sufficient intellect to comprehend the course of proceedings and details of the evidence. He knew that he had a right of challenge and, in view of the short time during which he had been in this country and the period for which he had lost his memory, it is highly improbable that he had made some enemy who would be on the jury. The words of the direction, "so as to make a proper defence," cannot alter the clear meaning of the earlier words, "comprehend the course of "proceedings on the trial," and the ultimate test laid down in *Rex* v. *Pritchard*[60] and approved in *Rex* v. *Governor of Stafford Prison, Ex parte Emery*,[61] is not whether the defendant is able to put forward any defence which he might have put forward had he been able to remember, but whether he can comprehend the course of the trial so as to make a proper defence. It is logical that that has been applied to deaf mutes: a deaf mute cannot communicate with others and it is impossible to know if he understands what is taking place. Cases which concern deaf mutes, therefore, should be distinguished. [Reference was also made to *Reg.* v. *Roberts*.[62]]

The statement of the law of England by Sir David Maxwell Fyfe at the Nuremburg trials in relation to Rudolf Hess is adopted as part of the argument in this respect. He said [The Trial of Major War Criminals (published under the authority of the Attorney-General, H.M. Stationery Office, 1946), November 11, 1945, Part 1. p. 301] that the words used by Alderson B. in *Rex* v. *Pritchard*[63] "'to comprehend the course of the proceedings at the trial so "'as to make a proper defence', emphasise that the material "time, the only time which should be considered, is whether at "the moment of plea and of trial the defendant understands "what is charged against him, and the evidence by which it is "supported," and, agreeing with the President, Sir Geoffrey Lawrence, "it does not relate to his memory. It has never, "in English jurisprudence, to my knowledge, been held to be "a bar either to trial or punishment, that a person who comprehends the charge and the evidence, has not got a memory as "to what happened at the time." A comparison was then made of the case which often occurred when, after a motor accident, a person charged with manslaughter said that because of the accident his memory failed him, which it had never been suggested could be a matter of relief from criminal responsibility.

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[60] 7 C. & P. 303, 304.

[61] [1909] 2 K.B. 81.

[62] [1954] 2 Q.B. 329.

[63] 7 C. & P. 303, 304.

As to the Scottish cases, the ground of the decision in *H.M. Advocate* v. *Robertson*[64] was that the defendant could not give any reasonable instructions for his defence and would not have been able to follow the evidence and its details rationally because it would have been coloured by his fixed delusion and curious views. *H.M. Advocate* v. *Brown*[65] should be distinguished because in that case there was a medical certificate by two doctors that the defendant was in the full sense insane. In the case of amnesia there can be no suggestion that a defendant is unable to give satisfactory instructions to his counsel at the time of the trial in the sense that they would be untrue; and while any instructions which Brown might have given might well have been untrue because he was insane, anything that the appellant in this case said must be assumed to be true because he was a sane man. In view of the judgments in *Russell's* case,[66] the direction in *Brown's* case[67] must be taken to be wrong: see the misgiving of Lord Sorn, who said[68] that the dictum of Lord Dunedin, Lord Justice-General, must be read in the context of the case and "The Lord Justice-General was not dealing with "an accused who was sane and rational at the time of his trial, "and in that case forgetfulness was only one of the ingredients "going to produce a condition approximating to insanity." Lord Cooper, Lord Justice-Clerk, said[69] that the dicta were not intended to be understood, or capable of being understood, literally as applying to the case of a sane prisoner, for so to read them would come near to paralysing the administration of justice. The judgment of the Court of Justiciary in *Russell's* case[70] is strong persuasive authority that the argument for the appellant here is wrong. The court held that loss of memory is no more than an element leading to the conclusion that a person is insane, and if it falls short of that and a person is otherwise sane and normal, as was the appellant here, that merely increases the onus of the Crown, that is, that the case for the Crown must be examined critically. Section 87 of the Lunacy (Scotland) Act, 1857, is almost identical with section 2 of the Criminal Lunatics

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[64] 3 White 6.
[65] 1907 S.C.(J.) 67.
[66] 1946 S.C.(J.) 37.
[67] 1907 S.C.(J.) 67.
[68] 1946 S.C.(J.) 37, 40, 41.
[69] Ibid. 47.
[70] 1946 S.C.(J.) 37.

Act, 1800, and it is submitted that this court should adopt the reasoning in *Russell's* case [70] and apply it to this case.

Lawton Q.C. in reply. The application of the tests in *Rex* v. *Pritchard* [71] turns on the meaning of the words " comprehend " and " make a proper defence." The basic meaning of " comprehend " is to lay hold of something, and its secondary meaning is lay hold of something with the intellect. To be fit to plead, therefore, the accused person must be able not only to understand, but to understand so as to realise the significance, in particular, of the details of the evidence. Otherwise it is meaningless to him. If, by reason of a disturbance of the mind, he cannot appreciate the significance of the evidence, he is unable to " make a proper defence " and is, therefore, " insane " within the meaning of section 2 of the Act of 1800.

LORD PARKER C.J. On September 24, 1959, Gunter Fritz Erwin Podola was convicted at the Central Criminal Court of the capital murder of Detective-Sergeant Raymond Purdy and was sentenced to death. After he was called upon to plead a jury was empanelled to find whether he was insane so as to be unfit to stand his trial, it being contended that he was suffering from hysterical amnesia which it was said amounted to such insanity. The judge directed the jury that the onus was on the defence to satisfy them that on the balance of probabilities the appellant was insane. On that direction the jury found that he was not suffering from hysterical amnesia, and was not insane so as to be unfit to stand his trial. The trial then proceeded, but the appellant did not appeal. The Secretary of State, however, being of the opinion that the question whether the direction was correct in law ought to be considered by the court, referred the whole case to the court under section 19 (*a*) of the Criminal Appeal Act, 1907. Under that provision the case falls to be heard and determined by this court as in the case of an appeal by the person convicted. The court, having heard the case as if it were an appeal, is of the clear opinion that the appeal should be dismissed. It will put its reasons into writing and give them at a later date.

Cur. adv. vult.

October 20. LORD PARKER C.J. This is the judgment of the court in the preparation of which we have all collaborated, including Donovan J., who is unable to be present today.

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[70] 1946 S.C.(J.) 37.

[71] 7 C. & P. 303, 304.

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On September 24, 1959, at the Central Criminal Court, one, Gunter Fritz Erwin Podola (hereinafter referred to as the "appellant"), was found guilty of the capital murder of Detective-Sergeant Raymond Purdy and was sentenced to death. He did not appeal against that conviction, but on October 5, 1959, the Home Secretary, being of opinion that a question of law raised by the case, namely, whether the onus of proof on the issue of fitness to plead rests on the prosecution or the defence, ought to be considered by this court, referred the whole case to the court for determination under section 19 (*a*) of the Criminal Appeal Act, 1907.

The events leading to the present reference may be shortly stated. On September 10, before the appellant was arraigned, Mr. Lawton, who appeared as counsel on his behalf, informed Edmund Davies J. that he had evidence available which raised a preliminary issue, namely, whether the appellant was fit to plead to the indictment, on the ground that he had completely lost his memory for all events before July 17, the day after his arrest. The judge was also informed that this preliminary issue would be contested, and he then heard argument on the question whether the burden of proof in that issue rested upon the defence or upon the prosecution. His decision was given in the following terms: "I rule accordingly upon this preliminary issue that it is for the "defence to establish that the accused man is insane so as to be "unfit to plead to the indictment." He went on to rule: "It is "sufficient for the defence to discharge the burden if they can "show, on the balance of probabilities, that this accused is unfit "to stand his trial."

At the suggestion of counsel on both sides the trial of the preliminary issue was itself taken in two stages. In the first stage the jury empanelled to try the issue were required to answer a specific question: "Is the defendant now suffering from a "genuine loss of memory covering at least all the events with "which he was concerned between July 1, 1959, and the time of "his arrest on July 16?" The trial of this issue lasted for nine days, in the course of which evidence was given by doctors on both sides, and after deliberating for nearly three and a half hours, the jury's answer to the question was that the appellant was not suffering from genuine loss of memory. As a result of that answer the second stage of the preliminary issue, in which the jury were required to find whether the appellant was insane so that he could not be tried, was very short. In our judgment, the judge rightly

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directed the jury that, in view of their answer to the specific question, and in the absence of any other evidence pointing to the appellant's insanity, it was their duty to say that he was fit to stand his trial. The jury's verdict was in accordance with this direction.

Having regard to the jury's answer to the specific question, the judge was not required to give any ruling or direction upon the issue whether, in the circumstances, the appellant's loss of memory (if established) would have been sufficient in law to bring him within the ambit of section 2 of the Criminal Lunatics Act, 1800.

The trial of the appellant on the charge of capital murder was then begun. He pleaded not guilty but was convicted and sentenced to death. No criticism is made on his behalf as to that trial.

The reference to this court was heard by us on October 14 and 15, 1959. At the outset of the hearing the Attorney-General, as amicus curiae, raised the question of our jurisdiction to hear the reference. Section 19 of the Criminal Appeal Act, 1907 [as amended by the Criminal Justice Act, 1948, s. 79 and Sch. 9], provides as follows: " Nothing in this Act shall affect the prerogative of mercy, but the Secretary of State on the consideration of " any petition for the exercise of His Majesty's mercy, or of any " representation made by any other person, having reference " to the conviction of a person on indictment or to the sentence " (other than sentence of death) passed on a person so convicted, " may, if he thinks fit, at any time either—(*a*) refer the whole " case to the Court of Criminal Appeal, and the case shall then " be heard and determined by the Court of Criminal Appeal " as in the case of an appeal by a person convicted. . . ." In substance the Attorney-General's contention was that this court's jurisdiction to hear and determine a case referred to it under section 19 (*a*) was limited to cases in which the person convicted would have had a right under the Act to appeal to the court. He pointed out that a possible difficulty in the way of our hearing the reference was created by the decision of this court in *Rex* v. *Jefferson*,[1] which is most fully reported in the Times Law Reports. In that case, the accused man had been found fit to plead and had then been tried for murder and convicted. In his appeal it was contended, inter alia, that on the medical evidence given at the preliminary inquiry he ought not to have been tried on the main charge at all. Darling J. intervened to say[2]: "The Act only "gives leave to appeal against a 'conviction'; how can you say "that a finding that a prisoner is fit to plead is a conviction?" Thereupon counsel for the appellant said that he must withdraw the appeal against the finding that the prisoner was fit to plead. Darling J. then added[2]: "I want to make that clear as a ruling "of this court." What was intended to be covered by that ruling is not altogether clear. It may be that its effect was limited to this: that the Act of 1907 does not enable this court to hear an appeal specifically expressed to be an appeal against a finding on a preliminary issue as to an accused person's fitness to plead, such finding not being a conviction. On the other hand, that ruling has apparently been taken to be a ruling that a person who has been found fit to plead, and thereafter convicted, cannot in any circumstances question the finding on the preliminary issue, or matters which arose in the course of its hearing. If the latter is the true meaning we think that the ruling was wrong. If a convicted person appeals against his conviction on the ground that the hearing of the preliminary issue was open to objection for error in law, so that he should never have been tried on the substantive charge at all, we are of opinion that this court has jurisdiction to entertain the appeal. In such a case it seems to us that the principles laid down in *Crane* v. *Director of Public Prosecutions*[3] are applicable, and that a convicted person is entitled to contend, in the words of Lord Sumner,[4] that he "should not have been given in charge to the jury as he was, or "have been made the subject of any verdict at all, but should "have had the proceedings stopped at the outset."

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[1] (1908) 24 T.L.R. 877.

In our judgment, the appellant in the present case could have appealed against his conviction upon the ground that in the hearing of the preliminary issue the judge misdirected the jury, and therefore that he should never have been tried upon the main charge at all. It follows that this court has jurisdiction to hear and determine the case referred.

In these circumstances we do not think it necessary to deal with an alternative contention put forward by Mr. Lawton, that on the true construction of section 19 (*a*) of the Act of 1907 this court has jurisdiction to hear and determine a case referred to it, even if the convicted person could not have appealed against the finding complained of. As it seems to us, a situation of that sort is unlikely to arise in practice and we think it undesirable to rule upon it in advance.

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[2] 24 T.L.R. 877, 878.

[3] [1921] 2 A.C. 299.

[4] Ibid. 332.

In the course of the hearing before us we heard argument, not only on the question specifically mentioned in the reference under section 19 (*a*), but also on the question to what extent (if any) amnesia could in law be regarded as a form of insanity within the meaning of section 2 of the Criminal Lunatics Act, 1800. Before we decided to consider the second of these questions, it was necessary for us to decide whether, in view of the decision of this court in *Reg.* v. *Caborn-Waterfield*,[5] it was open to us to do so. In giving the judgment of the court in that case Lord Goddard C.J. said[6]: "The court thinks that when a matter of "this sort is referred by the Secretary of State and we see at "once the ground on which the Secretary of State has referred "the case to us, the court must confine itself to that ground." In the present case the specific question referred to us related to onus of proof, but, in our view, that question involved by necessary implication the overriding question whether the issue, in respect of which there was doubt as to the onus of proof, was itself a relevant issue to be tried. In other words, the question as to onus of proof could only arise if the alleged amnesia could in law bring the appellant within the scope of section 2 of the Act of 1800. Accordingly, in hearing argument as to the legal effect of amnesia, we were considering a matter necessarily involved in the reference and were not departing in any way from the principle laid down in *Caborn-Waterfield's* case.[6] The decision in that case remains unaffected by the present case.

We deal first with the matter specifically referred to us, namely, the question as to onus of proof. The relevant words in section 2 of the Act of 1800 are as follows: ". . . if any person "indicted for any offence shall be insane, and shall upon arraign-"ment be found so to be by a jury lawfully empanelled for that "purpose, so that such person cannot be tried upon such indict-"ment. . . ." Those words do not indicate how or by whom the question of the accused person's sanity is to be raised, but it is now well established that the question may be raised either by the prosecution or by the defence or by the court itself. Indeed, if a court becomes aware, either before or during a trial, that the accused person's sanity is doubtful, it is the duty of the court to have the doubt resolved before beginning or continuing the trial. For the purpose of deciding whether a person is "insane . . . so that [he] cannot be tried upon such "indictment" a jury is empanelled, and, as Mr. Lawton emphasised on behalf of the appellant, the procedure before that jury is an inquiry and not a trial. In most cases in which this course is taken, there is no contest between the prosecution and the defence as to the accused person's insanity, and the evidence to that effect is unchallenged. In such cases, although the jury must be satisfied of the accused person's insanity before so finding, the question of onus of proof is not a live issue. But cases have arisen, of which the present one is an example, where either the prosecution or the defence has challenged the alleged insanity, and in a case in Scotland (*Russell* v. *H.M. Advocate*[7] to which more detailed reference will be made later) the court itself refused to give effect to a plea in bar of trial put forward on behalf of the defence and not contested by the prosecution.

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[5] [1956] 2 Q.B. 379; [1956] 3 W.L.R. 277; [1956] 2 All E.R. 636.

[6] [1956] 2 Q.B. 379, 385.

It was contended by Mr. Lawton that, inasmuch as the proceedings on the issue of insanity are an inquiry and not a trial, it is wrong to introduce any principle as to onus of proof, derived from proceedings properly regarded as trials. We do not agree with this contention. In our judgment, the right principles may be stated as follows:

1. In all cases in which a preliminary issue as to the accused person's sanity is raised, whether that issue is contested or not, the jury should be directed to consider the whole of the evidence and to answer the question "Are you satisfied upon that evidence "that the accused person is insane so that he cannot be tried "upon the indictment?" If authority were needed for the principle, it is to be found in the very words of the section itself, quoted above.

2. If the contention that the accused is insane is put forward by the defence and contested by the prosecution, there is, in our judgment, a burden upon the defence of satisfying the jury of the accused's insanity. In such a case, as in other criminal cases in which the onus of proof rests upon the defence, the onus is discharged if the jury are satisfied on the balance of probabilities that the accused's insanity has been made out.

3. Conversely, if the prosecution alleges, and the defence disputes, insanity, there is a burden upon the prosecution of establishing it.

These principles are in accordance with those laid down in a number of the cases to which our attention was called. In *Rex* v. *Dyson*[8] Parke J. told the jury that[9]: "If they were "satisfied that the prisoner had not *then*, from the defect of her "faculties, intelligence enough to understand the nature of the "proceedings against her, they ought to find her not sane." Five years later Alderson B., in *Rex* v. *Pritchard*,[10] expressly followed the course taken in *Dyson's* case[11] and observed that *Dyson's* case[11] had been considered by several of the judges who had approved of the course adopted by Parke J. In *Reg.* v. *Turton*,[12] Cresswell J., addressing counsel for the defence, said[12]: "Why is a man to be presumed insane when called upon to "plead? The presumption is that he is sane. I do not see any "sufficient reason for deviating from the old practice. If you "suggest that the prisoner is not in such a state of mind as to be "able to plead to the indictment, you must give evidence of the "fact." In *Rex* v. *Rivett*,[13] tried in 1950, Stable J. directed the jury to answer a question worded in similar terms to that contained in the first of the principles set out above, and when the case came before this court on appeal, Lord Goddard C.J. referred[14] to the learned judge's charge as "careful and "accurate." Lastly, in the Scottish case of *Russell* v. *H.M. Advocate*[15] the Lord Justice-Clerk (Lord Cooper), in giving the opinion of the court on appeal by the accused, said[16]: "The onus "is always on the accused to justify a plea in bar of trial, and "to do so not to the satisfaction of expert witnesses but to the "satisfaction of the court."

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[7] 1946 S.C.(J.) 37; 1946 S.L.T. 93.

Decisions conflicting with the principles enunciated above were brought to our notice: *Ley's Case*,[17] *Reg.* v. *Davies*[18] and *Reg.* v. *Sharp*.[19] In our judgment, these cases must be taken to have been wrongly decided, and a statement in Halsbury's Laws of England, 3rd ed., vol. 10, at p. 403, to the effect that when a preliminary issue of this sort is raised "the onus is on the "prosecution to prove the sanity of the defendant" is incorrect.

In our judgment, therefore, the direction of Edmund Davies J. in the present case on the subject of onus of proof was right.

As already indicated we have, however, thought it necessary, in the circumstances of the case, to consider whether the alleged state of mind of the appellant would have brought him within the provisions of section 2 of the Criminal Lunatics Act, 1800, had the jury found that that state of mind was a genuine one.

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[8] (1831) 7 C. & P. 305.
[9] Ibid. 307.
[10] (1836) 7 C. & P. 303, 304, 305.
[11] 7 C. & P. 305.
[12] (1854) 6 Cox 385.
[13] (1950) 34 Cr.App.R. 87.
[14] Ibid. 90.
[15] 1946 S.C.(J.) 37.
[16] Ibid. 44.
[17] (1828) 1 Lewin 239.
[18] (1853) 3 C. & K. 328.
[19] Post, p. 357, note; [1958] 1 All E.R. 62.

In considering this problem it is important to stress that the appellant, in the proceedings at the Central Criminal Court, relied solely on hysterical amnesia preventing him from remembering events during the whole of the period material to the question whether he committed the crime alleged. There was no suggestion that his mind in other respects was not a completely normal mind. His case on this point was that this defect of memory rendered him unable properly to instruct his advisers, with the consequence that he could not make " a proper defence." It was urged that the killing may have been accidental, or that there may have been provocation, but the appellant could give no instructions thereon. This defect, it was argued, rendered the appellant insane within the meaning of the Act of 1800.

Mr. Lawton, in the course of his careful and at first attractive argument, pointed out that the Act of 1800 was an Act declaratory of the common law, and invited us to go back and trace historically the meaning of the word " insane " which appears in the Act. He referred to the expressions " non sana memoria," " non sane " memory," and " not of sound memory," which are to be found in the books. He relied mainly on the following passages in Hale's Pleas of the Crown, vol. 1, pp. 34–35: " If a man in " his sound memory commits a capital offence, and before his " arraignment becomes absolutely mad, he ought not by law " to be arraigned during such his frenzy, but be remitted to " prison until that incapacity be removed; the reason is, because " he cannot advisedly plead to the indictment," and " if such " person after his plea, and before his trial, become of non sane " memory, he shall not be tried."

Mr. Lawton urged that these expressions must apply where all memory of the events surrounding the alleged crime has disappeared owing to hysterical amnesia. It is to be observed, however, that the above passages occur in Chapter IV where Sir Matthew Hale is considering " the defect of idiocy, madness and " lunacy " in reference to criminal offences. It will also be seen that in the first passage quoted, " sound memory " is contrasted with " absolutely mad " and with " frenzy." Accordingly, in our judgment, the word " memory " there used does not relate to recollection but to a state of mind. We think that this meaning is to be attached to the word " memory " not only in the passages in Hale but also in the passage in Coke's Notes on *Beverley's Case*,[20] and in other authorities previous to the Act of 1800 to which we were referred.

The words "If any person . . . shall be insane . . . so that "such person cannot be tried upon such indictment" contained in section 2 of the Act of 1800 have in many cases since 1800 been construed as including persons who are not insane within the M'Naughten Rules, but who by reason of some physical or mental condition, cannot follow the proceedings at the trial and so cannot make a proper defence in those proceedings. A well-known illustration is that of a deaf mute who is also unable to write or to use and understand sign language.

It was in the case of a deaf mute that Alderson B., in *Rex* v. *Pritchard*,[21] laid down the tests which ought to be applied when juries are considering whether a prisoner ought not to be tried by reason of his mental condition. These tests have been followed so often that they may be said to be firmly embodied in our law (see, for example, *Reg.* v. *Berry*[22] and *Rex* v. *Governor of Stafford Prison, Ex parte Emery*[23]).

In his address to the jury on the preliminary issue as to whether the prisoner was sane or not, Alderson B. said[24]: "There are three points to be inquired into: First, whether the "prisoner is mute of malice or not; secondly, whether he can "plead to the indictment or not; thirdly, whether he is of "sufficient intellect to comprehend the course of proceedings on "the trial, so as to make a proper defence—to know that he "might challenge any of you to whom he may object—and to "comprehend the details of the evidence, which in a case of this "nature must constitute a minute investigation. Upon this "issue, therefore, if you think that there is no certain mode of "communicating the details of the trial to the prisoner, so that "he can clearly understand them, and be able properly to make "his defence to the charge; you ought to find that he is not of "sane mind. It is not enough, that he may have a general "capacity of communicating on ordinary matters."

It is not suggested in this case that the appellant could not plead to the indictment, or that he did not know he had the right of challenge, or that he could not follow the evidence given, but Mr. Lawton submitted strongly that where there was the partial obliteration of memory alleged in this case, a prisoner could not make a proper defence and could not "comprehend" the details of the evidence within the meaning of the words used in *Pritchard's* case.[25]

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[20] (1603) 4 Co.Rep. 123b.
[21] 7 C. & P. 303.
[22] (1876) 1 Q.B.D. 447.
[23] [1909] 2 K.B. 81.
[24] 7 C. & P. 303, 304.

So far as "make a proper defence" is concerned, it is important to note that the words do not stand alone, but form part of a sentence the whole of which is[25] "whether he is of "sufficient intellect to comprehend the course of proceedings on "the trial, so as to make a proper defence." In other words, this passage itself defines what Alderson B. meant by "make a "proper defence." As to the word "comprehend," we do not think that this word goes further in meaning than the word "understand." In our judgment the direction given by Alderson B. is not intended to cover and does not cover a case where the prisoner can plead to the indictment and has the physical and mental capacity to know that he has the right of challenge and to understand the case as it proceeds.

This case is the first attempt in England to assert that hysterical amnesia covering the period of the events which are the subject of the indictment renders a man insane so that he cannot be tried. The matter has, however, come before the courts in Scotland. In 1907 there was the case of *H.M. Advocate* v. *Brown*[26] in the Court of Justiciary. In the course of summing up, the Lord Justice-General (Lord Dunedin) said[27]: "It "[insanity] means insanity which prevents a man from doing "what a truly sane man would do and is entitled to do—maintain "in sober sanity his plea of innocence, and instruct those who "defend him as a truly sane man would do. . . . But that is "not enough. There is something which is not generally asked "about, and that is that the person who is giving these instruc"tions should not only intelligently, but without obliteration of "memory as to what has happened in his life, give a true history "of the circumstances of his life at the time the supposed crime "was committed."

These are strong words, but it is important to realise that the medical evidence was that Brown was of unsound mind and not capable of pleading to the indictment, quite apart from any loss of memory.

In 1946 the case of *Russell* v. *H.M. Advocate*[28] came before the Court of Justiciary. In that case Lord Sorn, before proceeding with the case on its merits, held a preliminary inquiry into the facts upon which the prisoner based her plea in bar of trial. That plea was that she was suffering from hysterical amnesia and on that account was unable to plead to the charge or give instructions for her defence. That case, therefore, was a case very similar to the one before us. In his opinion upon this preliminary matter (which he tried without a jury) Lord Sorn said [29] that he was quite satisfied that the accused had in fact suffered a loss of memory. He went on to say [29]: "The next question, and the "difficult question, for me is—Does this loss of memory render "her unfit to plead?" He continued [30]: "I have felt that "the court in dealing with a plea in bar of trial is primarily con- "cerned with the condition of the accused now at the time of "trial and no other time. She is able to instruct, in my opinion, "a defence, even though that defence has the peculiarity of "including in its features that the accused has forgotten the "period of the events dealt with in the charge. . . . I am unable "to see that unfairness should follow from this situation. The "Crown must prove their case, and must prove it to the satis- "faction of the jury, and the accused can tell the jury that she "has no recollection of these events."

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[25] 7 C. & P. 303.

[26] 1907 S.C.(J.) 67.

[27] Ibid. 77.

[28] 1946 S.C.(J.) 37.

This decision of Lord Sorn came by way of appeal before the Lord Justice-Clerk (Lord Cooper), Lord Mackay and Lord Stevenson.

In the judgment of the court the Lord Justice-Clerk supported Lord Sorn, and in the course of his judgment said [31]: "The only "grounds associated with the abnormal personal condition of the "accused which our law and practice have ever recognised as "the basis of a plea in bar are (*a*) insanity (either in the ordinary "sense, or in the special sense of the Lunacy (Scotland) Act, "1857, s. 87)," where the words are similar to the words of the Act of 1800, "and (*b*) the condition of a deaf mute. There is "no trace in either Scotland or England of a plea in bar founded "upon loss of memory by a sane and otherwise normal accused "person." Later he said [32]: "I do not consider that they," that is, the dicta which are found in *Brown's* case,[33] "were intended "to be understood, or are capable of being understood, literally "as applying to the case of a sane prisoner . . . for so to read "them would come near to paralysing the administration of "criminal justice." Still later he said [34]: "The conclusions

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[29] 1946 S.C.(J.) 37, 39.

[30] Ibid. 40.

[31] Ibid. 46.

[32] Ibid. 47.

[33] 1907 S.C.(J.) 67.

[34] 1946 S.C.(J.) 37, 48.

"which I feel bound to draw are that loss of memory may be an "important element in leading to the conclusion that a panel is "insane. . . . But if it falls short of that, loss of memory in a "person otherwise normal and sane plays its full part, if it is "sufficiently proved, in increasing the onus on the Crown, and "in raising doubts to which it may be the duty of the jury to "give effect in a verdict of acquittal after investigation of the "whole case. But as our law stands, it can have no further or "other effect." As we understand it, the words "in increasing "the onus on the Crown" do not mean that strictly the onus is any greater, but that a judge should point out to a jury that they must take into consideration carefully the fact that the accused cannot remember the events.

We agree with the opinions stated and the conclusions arrived at in the case of *Russell*.[34] The word used in the Act of 1800 is the word "insane." It is true that in the case of a deaf mute the word "insane" does not strictly apply, but as was pointed out by Lord Alverstone C.J. in *Rex* v. *Governor of Stafford Prison, Ex parte Emery*,[35] the practice of including as coming within that word the case of persons who, from mental or physical infirmity, cannot follow what is happening in a case is in accordance with reason and common sense. We cannot see that it is in accordance either with reason or common sense to extend the meaning of the word to include persons who are mentally normal at the time of the hearing of the proceedings against them, and are perfectly capable of instructing their solicitors as to what submission their counsel is to put forward with regard to the commission of the crime.

To sum up the matter before us: (1) In our judgment there was a right of appeal by the appellant to this court. (2) There is no criticism to be made of the summing-up of the judge on the preliminary issue. (3) Even if the loss of memory had been a genuine loss of memory, that did not of itself render the appellant insane so that he could not be tried on the indictment, and no other ground for alleging insanity was put forward.

Accordingly, as the court stated earlier, this appeal is dismissed.

Appeal dismissed.

Solicitors: *Registrar, Court of Criminal Appeal; Director of Public Prosecutions; Treasury Solicitor.*

J. F. L.

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[34] 1946 S.C.(J.) 37.

[35] [1909] 2 K.B. 81, 84, 85.

NOTE.

1957
July 10, 11.

Salmon J.

[BIRMINGHAM ASSIZES.]

REGINA *v.* SHARP.

Criminal Law—Plea—Fitness to plead—Burden of proof—Accused mute on arraignment—Whether onus of proof on prosecution to show mute of malice—Standard of proof—Accused found mute by visitation of God—Whether fit to plead.

TRIAL ON INDICTMENT.

The defendant, George Myhill Sharp, was charged on an indictment containing a number of counts alleging serious offences against young girls. On arraignment he stood mute, and a jury was empanelled to try the issue whether he was mute of malice or by the visitation of God. The trial of that issue proceeded; the prosecution opened their case and evidence was called on both sides. At the close of the evidence counsel for the prosecution sought a ruling as to who should first address the jury.

SALMON J. expressed the provisional view that the onus was on the prosecution to show that the defendant was mute of malice.

Bernard Gillis Q.C. and *W. A. L. Allardice*, for the defendant, referred to *Reg.* v. *Turton.*[1] The onus is on the prosecution to show that the defendant is mute of malice, and the degree of proof is that normally required in criminal cases. No lower degree of proof should be accepted: an allegation that a defendant is mute of malice is an allegation of fraud upon the court and an endeavour to pervert the course of justice, and it would be contrary to the traditions of the common law and to the principles upon which justice is administered in Her Majesty's courts if an accused person were found to be mute of malice unless the proof was such that it enabled the jury to say that they were sure, or that it was proved to their satisfaction or, to use the older language, that they had no reasonable doubt.

M. A. B. King-Hamilton Q.C. and *H. J. Garrard* for the prosecution. There is no direct authority one way or the other as to the burden of proof, and if the view of the court is that it rests on the prosecution, that would not be dissented from. It is not a criminal offence to be mute of malice, and it is submitted, therefore, that the standard of proof required is not the high standard required in criminal cases where the burden rests on the Crown but that it is no higher than that required in a case depending on the balance of probabilities.

SALMON J. I think that the balance of probabilities is one of the matters to be taken into account. I should be disposed to direct the jury that before they can find that the defendant is mute of malice they must be quite satisfied that that is the fact. The onus being on the prosecution, it is for counsel for the defendant to address the jury first.

Counsel addressed the jury accordingly.

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[1] (1854) 6 Cox 385.

Salmon J. Members of the jury, as counsel rightly told you, this question which you have to decide is one of great importance. On the one hand, if a prisoner called upon by the Clerk of Assize fails to answer, and if it be the fact that that is through no fault of his, it would be manifestly most unfair that he should be found to be mute of malice. On the other hand, if the muteness is assumed for the purpose of avoiding or postponing the trial, it is equally important from the public point of view that he should not get away with it, because, when trials are postponed, witnesses who perhaps might be called are not available when the trial comes on, and witnesses, particularly when they are young witnesses, as they are here, may have forgotten; so it is very important that you should not find him mute of malice unless he is, and very important, on the other hand, that you should not find him mute by the visitation of God unless he is mute by the visitation of God. In cases where a man is mute (and they are not very common) sometimes he is mute because he has had a stroke or some injury to his larynx or there is some physical cause of that sort, and in such cases it is comparatively easy for a jury to decide whether he is genuine or whether he is not; but in this case, which is a rare one, it is not suggested that there is anything physically wrong with him at all. It is suggested that the inability to speak is due to some emotional or psychological cause, and obviously this question which you have to consider is difficult and is a question which has caused differences amongst the doctors.

Members of the jury, you must not do what I suppose we may be sometimes tempted to do when faced with a problem of this sort: throw up our hands and say: it is difficult, I cannot decide it. You have to do your best to decide it and consider the whole of the evidence. If when you really have considered the whole of the evidence you are completely satisfied that this man is shamming, to put it in homely language, you will find that he is mute of malice; but, if the evidence does not satisfy you, then you will find he is mute by visitation of God.

Just let us consider together what the evidence is.

[His Lordship then reviewed the evidence, reminding the jury, inter alia, that it was conceded that there was nothing wrong with the defendant and that he was a highly intelligent man who understood what was going on, but that it was suggested that his inability to speak was due to an emotional or psychological cause, and continued:] Those are all matters, members of the jury, which you will have to consider. As I have said before, this is of its very nature an extremely difficult problem. Quite naturally in a case of this sort distinguished medical gentlemen differ in their views, but it is perhaps the sort of question, even although in a sense it is a medical one, on which a jury can use their own common sense. If, when you have heard all this evidence and have considered everything, you say to yourselves: we are satisfied that this man is faking, because he does not want to come to trial and is hoping to postpone and, if possible, avoid trial, if you are satisfied about that, then you will find that he is mute of malice; but, if having weighed it all up, you are not satisfied that he is faking, if having heard it all you say: well, there is no more here than a faint suspicion and we are not satisfied, if your minds are left in that state, then you will find he is mute by visitation of God. Members of the jury, will you be good enough to consider your verdict.

The jury returned a verdict of mute by visitation of God.

King-Hamilton Q.C. contended that the next issue was whether the defendant was fit to plead, and then, if he was fit to plead, whether he was fit to stand his trial. [Reference was also made to *Rex* v. *Pritchard*,[2] *Rex* v. *Dyson*,[3] *Reg.* v. *Berry*[4] and *Rex* v. *Governor of Stafford Prison, Ex parte Emery*.[5]] It is urged, particularly in the circumstances of this case, that those are two separate questions and that they should be tried separately. That course would seem to be in accordance with the authorities.

Gillis Q.C. for the defendant.

SALMON J. I think that there is only one issue. The difficulty is that the two questions are to some extent bound up with each other, because, if the defendant is not capable of communicating with others he could not get the advice he would be entitled to get before he decided whether to plead guilty or not guilty. The real question here is: Is he capable of standing his trial? I am going to leave the matter to the jury in this form: Is the defendant capable of pleading to the indictment and of standing his trial?

The jury was sworn in the following form: "I swear by Almighty "God that I will faithfully try whether George Myhill Sharp, the "prisoner at the Bar, who stands indicted with felony and misdemeanour, is capable of pleading to and of taking his trial on the "indictment, and give a true verdict according to the evidence."

Gillis Q.C. submitted that the burden of proof on the issue of fitness to plead rested on the prosecution. Where a defendant is arraigned in ordinary circumstances and the defence desire to raise that issue it is conceded that it is for the defence to accept the burden of proof because a person is presumed to be in possession of all his faculties until the contrary is shown. Where the issue is raised by the Crown, then the burden is upon the Crown. But where, as here, the defendant has been found to be mute by the visitation of God it is submitted that there is a presumption that he is not fit to plead. [Reference was also made to *Reg.* v. *Roberts*,[6] *Reg.* v. *Beynon*[7] and *Reg.* v. *Davies*.[8]] If any case in which this issue is raised comes to the notice of the court, no matter in what way it is raised, it is the duty of the court to satisfy itself that the defendant is fit to plead; it is not an issue joined, but the court has a duty to inquire.

King-Hamilton Q.C. The jury have found that the defendant is mute by the visitation of God and therefore, if no further issue were

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[2] (1836) 7 C. & P. 303.

[3] (1831) 7 C. & P. 305.

[4] (1876) 1 Q.B.D. 447.

[5] [1909] 2 K.B. 81.

[6] [1954] 2 Q.B. 329; [1953] 3 W.L.R. 178; [1953] 2 All E.R. 340.

[7] [1957] 2 Q.B. 111; [1957] 2 W.L.R. 956; [1957] 2 All E.R. 513.

[8] (1853) 3 C. & K. 328.

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raised, it would be the duty of the court to enter a plea of not guilty. The normal presumption is that a defendant is fit to plead, and the court would enter that plea simply because the defendant cannot speak. If the defence wish to raise the further issue that he is unfit to plead, it is for them to establish it. There is no difference between this case and the ordinary case where there is an issue whether the defendant is fit to plead on the ground of insanity, when the onus is on the defence.

[SALMON J. Is there any authority for the proposition that when a preliminary issue is raised as to whether the defendant is fit to plead and stand his trial the onus is on the defence?]

There does not appear to be any clear authority, but the normal practice is that if, as usually happens, the prosecution agree that the defendant is unfit to plead on the ground of insanity, the court is informed and the prosecution hand their witnesses over to the defence so that the defence can avail themselves of the medical evidence in the hands of the prosecution.

[SALMON J. I do not believe very much will turn on the onus of proof in this case. Inasmuch as it is the duty of the court to satisfy itself that the defendant is fit to plead and stand his trial, I think that it would be right for the prosecution to put its evidence before the court and to begin.]

If that is the view of the court, the prosecution would not dissent from it.

[SALMON J. Yes.]

Counsel for the prosecution then opened the case; evidence was called for the prosecution and defence, and counsel for the defence and the prosecution addressed the jury.

SALMON J. summed up to the jury as follows: Members of the jury, when it appears that there is some question as to whether a prisoner is capable of pleading to the indictment and standing his trial, it is the duty of the court to make sure that he is capable of doing so before the trial is allowed to proceed, because it is repugnant to our sense of justice and fair play that a man who is really unable to plead and unable properly to stand his trial should be put upon his trial. Therefore, you have got to decide, and it is entirely a matter for you, whether in your judgment you are satisfied that the defendant is fit to plead and fit to stand his trial.

You tried another issue yesterday, namely, whether he was mute of malice or mute by the visitation of God, and you have decided on the evidence that was called before you that he was mute by visitation of God. If you came to the conclusion today that the defendant cannot communicate with his advisers and could not communicate with you, the jury, if he were called to give evidence, he would not be fit to plead and he would not be fit to stand his trial. It really comes to this, members of the jury, that one of the most important questions about which you have to be satisfied is: is he fit to communicate with his advisers and would he be fit to communicate whatever he wanted to communicate to the court if he were called to give evidence? The fact that he may be mute is not conclusive, because, if he could by sign and by writing communicate sufficiently with his advisers so as to make his meaning plain and give them proper instructions, and, if when he was called upon to give evidence, although he could not speak, he could nevertheless write down his answers, then you ought to find as answer to the question you pose yourself "Is he capable of communicating with "his advisers or with the court?" "Yes"; he may not be able to communicate by word of mouth, but, if you are satisfied he could communicate in writing, that is quite enough. You have heard all the evidence and it is for you to decide. In addition to that important point about whether he can communicate, you would have to consider the question also: Are you satisfied that he can understand? A man may be able to communicate, but if he cannot understand he is not capable of standing his trial. A man may be able to understand but not be able to communicate, and he is still not capable of taking his trial.

[His Lordship referred to the evidence and continued:] You have heard the medical evidence on the one side and on the other. I am not going to go through that again with you, because you have heard it twice already in the course of the last two days, and I am sure that it is fresh in your memory. You have got to bring your knowledge of the world and common sense to bear here. You have to remember that it would be most wrong that a man who is not really fit to take his trial should be put on his trial. You have to remember, on the other hand, that it would be most wrong that a man who is shamming, if he is shamming, should thereby be able to postpone and possibly avoid his trial. You have to consider all these matters, and, bringing the best judgment you can to bear, you must say whether today you are satisfied or not that this man is fit to stand his trial and capable of pleading. If you are not satisfied that he is fit to stand his trial, you will say so; but, if you are satisfied he is fit to stand his trial, you will equally say so. Will you please consider your verdict.

[The jury returned a verdict that the defendant was capable of pleading and of taking his trial on the indictment. The trial then proceeded and the defendant was found guilty and convicted.]

Solicitors: *Director of Public Prosecutions; Hawley & Phoenix, Loughton.*

J. F. L.

KENSINGTON BOROUGH COUNCIL *v.* WALTERS.

1959
Oct. 30.

Lord Parker C.J., Cassels and Edmund Davies JJ.

Local Government—Property—Damage to—Recovery of expense of making good — Against person who "carelessly or accidentally "damages"—Involuntary act—London Government Act, 1939 (2 & 3 *Geo.* 6, *c.* 40), *s.* 181 (3).

[Reported by A. H. BRAY, Esq., Barrister-at-Law.]

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KENSINGTON BOROUGH COUNCIL *v.* WALTERS.

Metropolis—London Government Act—Damage to corporation property —Recovery of expense from him who damaged it—Involuntary act— London Government Act, 1939, *s.* 181 (3).

Words and Phrases—"Accidentally or carelessly damages"—London Government Act, 1939, *s.* 181 (3).

Causation—Statutory liability—Irrelevance—Liability for involuntary act—London Government Act, 1939, *s.* 181 (3).

Trespass—Involuntary—Statutory liability—Damage to corporation property—London Government Act, 1939, *s.* 181 (3).

The respondent, while driving his car along a road, was involved in a collision with another car whereby the respondent's car came into contact with a street refuge vested in the local authority, as a result of which the refuge was damaged. The driver of the other car was responsible for the collision. The respondent was not. The local authority demanded payment of the cost of repair from the respondent under section 181 (3) of the London Government Act, 1939,[1] and he, having failed to pay the sum demanded, was summoned before the justices, who dismissed the complaint. On appeal by the local authority:—

Held, allowing the appeal, that section 181 (3) provided a speedy remedy for a local authority to recover expenses incurred in repairing damage without having to consider who was blameworthy and it entitled the authority to recover such expenses from the person whose hand or vehicle had actually come into contact with and damaged their property whether voluntarily or, as in this case, involuntarily; accordingly, the respondent was liable for the cost of repair.

Dictum of Wills J. in *Harding* v. *Barker* (1888) 53 J.P. 308, 309 applied.

CASE STATED by County of London justices sitting at Kensington.

On February 10, 1959, a complaint was preferred by the appellants, the Kensington Borough Council, through their town clerk, against the respondent, Henry Stanley Walters, that he, having on June 19, 1958, damaged a street refuge, in the Cromwell Road, London, S.W.7, when driving a motor-car, and having failed to pay the sum of £25 0s. 1d., being the expenses incurred by the appellants in repairing the damaged refuge, after demand by them, owed that sum to the appellants in accordance with section 181 (3) of the London Government Act, 1939.

On March 17, 1959, the justices heard the information and found the following facts: A street refuge in the Cromwell Road,

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[1] London Government Act, 1939, s. 181: "(3) If any person accidentally or carelessly damages any property vested in a local authority, the authority may recover from him summarily as a civil debt the expenses incurred by it in making good the damage."

London, S.W.7, was part of the property vested in the appellants as a local authority for the purpose of the London Government Act, 1939. The respondent on June 19, 1958, was driving his car along the Cromwell Road when he was involved in a collision with another car turning into the Cromwell Road on his left-hand side. Immediately before the collision the refuge was in good order. Just after the collision the respondent's car came into contact with the refuge with such force that the concrete base to its guard post was completely destroyed. Within a short time after the collision, the respondent described to a police constable what had happened in these words: "I was coming west along Cromwell "Road. I swerved to avoid another car, hit the island and turned "over." While the respondent was taking avoiding action, the other car hit the side of the respondent's car with such force that it drove his car into the refuge, and but for the collision the respondent's car would not have come into contact with the refuge. The person responsible for the collision was the driver of the other car and not the respondent. The refuge was repaired by the appellants at a cost of £25 0s. 1d., which sum represented the expenses incurred by the appellants in making good the damage to the refuge. On September 26, 1958, the appellants sent an invoice to the respondent demanding payment of £25 0s. 1d. and the respondent had failed to pay that sum.

It was contended by the appellants that the respondent was liable to pay the sum of £25 0s. 1d. in any event by virtue of section 181 (3) of the London Government Act, 1939, whether or not the respondent's driving involved any degree of negligence.

It was contended by the respondent that the person really at fault was the driver of the other car, that the respondent was not responsible for his own car coming into contact with the refuge, that the damage to the refuge was caused by the respondent's car being driven onto it by the other car concerned, and that he was, accordingly, not liable to pay the sum demanded.

The justices were of the opinion that the respondent's contentions were correct and dismissed the complaint.

The local authority appealed.

Paul Wrightson for Kensington Borough Council. The respondent is liable to pay the cost of repairing the damage to the refuge in any event by virtue of section 181 (3) of the London Government Act, 1939. The words "accidentally or carelessly "damages" in that subsection import no negligence and are

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KENSINGTON BOROUGH COUNCIL v. WALTERS.

in direct contrast to the words in section 181 (2) of the Act. Whereas the latter subsection implies a negligent act, the former implies only an accidental one. There are three authorities relating to wording similar to that of section 181 of the Act of 1939 in earlier Acts. In *Harding* v. *Barker*[2] Wills J. was of opinion that the words "In case any person carelessly or accidentally . . . damage" in section 207 of the Metropolis Local Management Act, 1855, did not relate to anybody but the person actually doing the careless or, as in that case, accidental act. Section 206 of that Act referred to wilful damage corresponding to the wording of section 181 (2) of the Act of 1939. This authority supports the appellant's view because the employer was there summoned vicariously for the servant's accidental act and was held not to be liable. In *Burgess* v. *Morris*,[3] another case under section 207 of the Act of 1855, the driver of an omnibus was held liable under that section for the accidental breaking of a street lamp without any negligence on his part, although it was argued that the real cause of the damage was negligence on the part of the local authority. The same distinction between wilful damage and accidental or careless damage was found in sections 19 and 20 of the Gas Works Clauses Act, 1847: see *Ashton* v. *Eccles Corporation*,[4] where the same construction was put on those sections also.

It is plain that the respondent knocked down the refuge. He did so in attempting to avoid an accident and, though there was no negligence on his part, he is liable for the cost of repair.

[LORD PARKER C.J. Section 181 (3) seems to be dealing with the hand that does the damage.]

Yes.

The respondent in person. I did not commit the act which caused the damage, therefore there is no question of any accidental or careless act on my part at all. If my car had been stationary and had been hit by another vehicle and thrown against the refuge, surely that would not make me liable for the damage? I did not even partially commit the act causing the damage. This is a penal Act and the section should be construed in my favour.

LORD PARKER C.J. stated the facts and continued: In my judgment, this case depends entirely on the correct interpretation to be placed upon section 181 of the London Government Act, 1939. By subsection (1) it is provided that a person who has charge of any property vested in a local authority who fails to deliver up such property shall be guilty of an offence and liable to be fined and also be liable to pay the value of the property. Subsection (2) provides: "If any person wilfully damages any "property vested in a local authority, he shall in respect of each "offence be liable on summary conviction to a fine not exceeding "40 shillings and to pay to the authority the expenses incurred "by it in making good the damage." By subsection (3) it is provided: "If any person accidentally or carelessly damages any "property vested in a local authority, the authority may recover "from him summarily as a civil debt the expenses incurred by "it in making good the damage." Observe that the damage referred to in subsection (3) does not create any offence at all; it is merely saying that the expenses of making good that damage may be recovered summarily as a civil debt.

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[2] (1889) 53 J.P. 308.

[3] (1897) 61 J.P. 553.

[4] (1906) 71 J.P. 55.

Mr. Wrightson has referred us to a number of cases. I think it is unnecessary to refer to them in detail. The words "accidentally or carelessly damages" do not appear in the London Government Act, 1939, for the first time. They were to all intents and purposes the same in the Metropolis Local Management Act, 1855, and in the Gas Works Clauses Act, 1847; indeed, I think the only difference was that the word "carelessly" came before the word "accidentally" in those two statutes. It is clear from the authorities that the words corresponding to subsections (2) and (3) have been treated as providing, first, in regard to the words of subsection (2), for wilful or negligent damage for which there is a penalty as well as a right to recover the expenses, and, secondly, in regard to the words of subsection (3), for something which is not wilful and not negligent, namely, accidentally or carelessly, in which case there is no penalty. In one of the cases it is said that "carelessly" is something akin to "accidentally."

The real point, as I see it, is whether subsection (3) is aimed at the person who is responsible for the damage and who as a matter of causation has caused it, or whether it is aimed at the person whose hand or vehicle has come in contact with the property and caused damage to that property thereby. In my judgment, the latter is the correct view. I think that this subsection is providing a speedy remedy for a local authority to recover expenses incurred in repairing damage without having to consider who is blameworthy in that respect. They are entitled under this subsection to recover from the person whose hand or vehicle has actually come in contact with and damaged their property. I get some support for that view from the judgment of Wills J. in *Harding* v. *Barker*.[1] That was a case which arose under the Metropolis Local Management Act, 1855. It was a case in which a driver had accidentally caused damage to a street lamp and the complaint was made against his employer. Wills J. said[2]: "I am of the same opinion. I think the 207th section "does not relate to anybody but the person who is actually doing "the careless act. But here it was not even a careless act, for "the justices found that it was a mere accident. Therefore, there "is no satisfactory ground for holding that the master here would "be liable." I think that section 181 (3) does not relate to anybody but the person who actually does the accidental or careless act, whether voluntarily or involuntarily, as in this case, where he was forced into the street refuge. If the owner of the car who had forced the respondent's car into the refuge had been summoned, I think his answer would be: "It was not my hand, "not my car, that came into contact with the street refuge. It "may have been my negligence that caused it but for that I "cannot be summoned under the subsection although I could be "proceeded against at common law."

I think that this appeal should be allowed and that the case should go back to the justices with an intimation that the complaint was proved.

CASSELS J. I agree. The respondent may well feel he has a grievance in the matter because he can quite reasonably and rightly say that he was in no way to blame, but this is not a case of blameworthiness at all. So far as the respondent was concerned, it was a pure accident for which no one can say anything against him, but, on the other hand, the words of the statute are very plain: "If any person accidentally or carelessly damages "any property vested in a local authority, the authority may "recover from him summarily as a civil debt the expenses "incurred by it in making good the damage."

This is just one of those cases in which it may well seem strange to the individual who is called upon to put his hand into his pocket and pay for damage for which he was in no way responsible, merely because it happens to be his motor-car which caused the actual damage. I was impressed somewhat by the illustrations the respondent put before us, quite properly. It does seem strange that if a pedestrian walking along the High Street, Kensington, should be pushed through a window belonging to the local authority, that the local authority receiving him through the broken window can put out their hands and say: "The damage "is so much." Nonetheless, that is the position in which the respondent here finds himself. I agree that the appeal should be allowed and the case remitted to the justices to make an order for the recovery of the debt.

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[1] (1889) 53 J.P. 308.

[2] Ibid. 309.

EDMUND DAVIES J. I agree. One cannot but sympathise with the respondent for the position in which he finds himself, for £25 is no small sum to find, and, if I may say so, he has put forward his argument with eminent clarity and ability. But the subsection, unlike subsection (2), without importing blame or penalty provides a simple remedy for the recovery of the cost of damage done to property vested in the local authority. It renders liable the person whose person or property actually, accidentally or carelessly, damages such property, leaving him to enforce any claim he may have over against a third party. I accordingly agree that this appeal should be allowed.

Appeal allowed with costs.

Solicitors: *J. Waring Sainsbury, Town Clerk, Kensington.*

ELLIOTT *v.* GREY.

1959
Oct. 30.

Lord Parker C.J., Cassels and Edmund Davies JJ.

Road Traffic—Third party insurance—" Use . . . a motor vehicle on a " road "—Car not used—Whether " used "—Car immobilised in road —Road Traffic Act, 1930 (20 *&* 21 *Geo.* 5, *c.* 43), *s.* 35 (1).
Statute—Construction—Mischief aimed at—" Use " of a motor-vehicle— Road Traffic Act, 1930, *s.* 35 (1).

The owner of a motor-car which had broken down left it in the road outside his house until it could be repaired. He suspended the third party insurance in the meantime. The car could not be mechanically propelled because, inter alia, the engine would not

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[Reported by A. H. BRAY, Esq., Barrister-at-Law.]

work, the battery had been removed, and there was no petrol in the tank. At the material time the owner had no intention of driving it or of moving it from its position in the road. The owner was convicted of unlawfully using the car without there being in force a third party insurance, contrary to section 35 (1) of the Road Traffic Act, 1930.[1] On appeal:—

Held, that the word "use" in section 35 (1) was equivalent to "have the use of a motor-vehicle on the road," and as the car could be moved, albeit not driven, the owner had the use of it on the road within the meaning of the section and was guilty of an offence.

CASE STATED by South Shields borough justices.

On March 6, 1959, an information was preferred by the respondent, Stanley Grey, against the appellant, Elijah Elliott, that he on February 7, 1959, unlawfully used on Belloc Avenue, South Shields, a motor-car, there not being in force in relation to him as user of such a motor-vehicle by him such a policy of insurance or such a security in respect of third party risks as complied with the requirements of Part II of the Road Traffic Act, 1930, contrary to section 35 (1) of that Act.

The justices heard the information on March 23, 1959, and found the following facts: The appellant at 10.30 p.m. on February 7, 1959, was the owner of a motor-car which was standing parked outside his house at 54, Belloc Avenue, South Shields. The appellant was the person responsible for the car being on that road and clearly intended to use the vehicle when it suited his purpose. On December 20, 1958, the car broke down and could not be driven because its carburettor broke, its self-starter would not work and its starting handle would not fit into the starting handle hole because its worm end would not fit. Immediately after the breakdown, the appellant decided to lay the car up outside his house and accordingly prior to February 7, 1959, he had placed the car in Belloc Avenue outside his house by manhandling it into position, as it could not be driven at all, jacked the car up so that its wheels were off the ground and removed the battery of the car. From the date of the purchase of the car until a date in the middle of January, 1959, the appellant had a policy of insurance in relation to his user of the car which complied with the requirements of Part II of the Road Traffic Act, 1930. In the middle of January, 1959, the appellant caused this policy to become suspended, intending to make it effective again as soon as he had put his car into running order and so no longer had it laid up. When the police had required the appellant to produce a certificate of insurance for the use of the car on the road, he had been unable to produce such a certificate or other security in respect of third party risks, stating that he had sent the insurance back saying he had laid the vehicle up from December, 1958. On February 7, 1959, another motor-car had collided with the appellant's car stationary in Belloc Avenue. On that day the appellant had been working on the car and had cleaned it, oiled its locks and lowered it to the ground, sent its batteries to be recharged, removed the broken carburettor and fitted a new carburettor into the car, examined the self-starter and found, as was the fact, that its solenoid needed renewing. At all times on February 7, 1959, the car could not be mechanically propelled because its engine would not work and by that date the petrol in its tank had evaporated away. The appellant had no intention of driving the car on February 7, 1959, or of moving it from its position on the roadway.

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[1] Road Traffic Act, 1930, s. 35 (1): "Subject to the provisions of this "Part of this Act, it shall not be "lawful for any person to use, or to "cause or permit any other person to "use, a motor vehicle on a road unless "there is in force in relation to the "user of the vehicle by that person "or that other person, as the case "may be, such a policy of insurance "or such a security in respect of "third-party risks as complies with "the requirements of this Part of "this Act."

It was contended by the appellant that the car was not being used by him on February 7, 1959, because user of a motor-vehicle did not include putting it onto a road and maintaining it in one position in a condition where physically it could not be driven and was not available for use as a motor-vehicle; if it had been in a garage, it would not have been "used"; if a motor-vehicle was immobilised in a yard and was pushed into the street to be taken away as scrap, it could not be said to have been "used"; that the legislature used careful words; for example, in the offence of causing a motor-car to stand on the road without the necessary lights, the word "cause" was used and not the word "use" and this word "cause" would cover a laid-up vehicle, whereas the word "use" would be inappropriate. The appellant accepted that a stationary vehicle could be used if it was available for use at the time and the only question was whether or not the vehicle was being used on February 7, 1959.

It was contended by the respondent that the purpose of section 35 of the Road Traffic Act, 1930, was to ensure that when a motor-vehicle was on the road there should be proper cover against such third party risks as might occur in consequence of the motor-vehicle being on the road. Throughout the Road

Traffic Act, 1930, the word "drive" was constantly used in connection with offences involving driving, whereas in section 35 the word "use" was used and obviously the legislature had intended to cover a motor-vehicle both when it was being driven and when it was not being driven on the road. A motor-vehicle left standing could run away and cause injury or damage to a third party, or a stationary motor-vehicle could be walked into or run into in such circumstances as to give rise to third party injury or damage, or a motor-vehicle could be stationary on the road and be used to carry goods or keep property in, and in all these circumstances the vehicle was being used. In the event of the appellant's argument being correct, if a motor-vehicle was parked on a road and the insurance expired at 12 noon and the owner was required to produce to the police a certificate of insurance at 12.5 p.m. without the vehicle having been driven, he would have a defence to a similar charge merely by stating that he was not using the vehicle.

The justices were of the opinion that when a motor-vehicle was standing on the road and was not being driven, it could be said to be used, and they convicted the appellant. Owing to the mitigating circumstances, the justices ordered that the appellant be discharged absolutely and ordered him to pay 4s. court costs and £3 3s. towards the legal costs of the prosecution.

The appellant appealed.

James W. Miskin for the appellant. The question is whether the appellant had used his car on the road when the material facts were as found by the justices. "To use . . . a motor "vehicle on a road" means to take advantage of that vehicle as a means of transport, although it is conceded that it includes the periods of time between actual periods of transport. The appellant is charged with committing the offence on February 7, 1959, on which date the justices found that the car could not be used. The words of section 35 (1) of the Act of 1930 are "to "use, or to cause or permit any other person to use, a motor "vehicle on a road," and it is submitted that if a mechanic had been working on the car on the date in question he would not have been using it.

[CASSELS J. It is the fact that it is done on a road that is important.]

Yet, if the mechanic had been working on the car in a garage, he would not have been using the car.

[LORD PARKER C.J. When does a motor-car cease to be a motor-car?]

By section 1 of the Act of 1930, Part I of the Act applies to all mechanically propelled vehicles intended or adapted for use on roads, therein called motor-vehicles and to vehicles drawn by motor-vehicles.

In order to cover the circumstances of this case, section 35 (1) of the Act of 1930 should read " cause or permit a motor vehicle " to be on a road ": see section 1 (3) of the Road Transport Lighting Act, 1957. Alternatively, the words " place on " or " have on " would have to be substituted for the word " use."

In the present case it is conceded that the act of manhandling the car into position would constitute user, but the appellant did not lose his cover until after he had so manhandled it.

[EDMUND DAVIES J. It is an offence under section 50 of the Act of 1930 to leave a vehicle in a dangerous position on a road.]

If such words as " cause to be on " are used, one does not have to consider user. User means using the vehicle as a means of transport, including the intermediate periods between driving. Here there was no intention on the part of the appellant of using the car or of driving. The essential factor is that the justices found that the car was laid up. The user of a motor-vehicle on a road was considered in *Gifford* v. *Whittaker*[2] and *Lawrence* v. *Howlett*.[3]

Frank Whitworth for the respondent. Section 35 is in Part II of the Act, which provides for the protection of third parties. The word " use " in that section is really equivalent to " have " the use of a motor-vehicle on the road ": see *Lawrence* v. *Howlett*.[3] Even if the car in this case had been completely immobilised, the appellant would have had the use of it on the road and an offence would have been committed under the section.

LORD PARKER C.J. stated the facts, and continued: The short question in this appeal is what is meant by the words " use . . . a " motor vehicle on the road " within the meaning of section 35 (1) of the Road Traffic Act, 1930. [His Lordship read section 35 (1), and continued:] One thing seems to be clear, and that is that " use " there is used in contradistinction to the word " drive," which appears in other sections, such as section 11 and section 12, dealing with dangerous and careless driving. Prima facie, it is a wider term and includes something more than driving and certainly would include moving.

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[2] [1942] 1 K.B. 501; 58 T.L.R. 195; [1942] 1 All E.R. 604.

[3] [1952] 1 T.L.R. 1476; [1952] 2 All E.R. 74.

The other thing which I think is clear and, indeed, it is conceded by Mr. Miskin, who has argued this case with great care, is that an offence may well be committed under this section in the intervening periods between driving or between moving. But he says that the ordinary use of the word to " use " a motor-car does contemplate some active movement either in driving it or taking part in a journey in it or moving it, and that the word is quite inapt to describe a motor-car which cannot be used because it is out of action, not merely because it needs a little petrol but because the machine cannot work at all. I am influenced by the fact that this section appears in Part II of the Act under the heading of " Provision against third-party risks arising out of " the use of motor vehicles." If one goes on to section 36 it provides the form of policy of insurance which is required, which is: " insures such person, persons or classes of persons as may be " specified in the policy in respect of any liability which may be " incurred by him or them in respect of the death of or bodily " injury to any person caused by or arising out of the use of the " vehicle on a road." It is something for the protection of third parties. Approached in that way, it seems to me that the word " use " there is, as Mr. Whitworth suggests, really equivalent to " have the use of a motor-vehicle on the road." Indeed, Mr. Miskin's suggested definition, which I think was that " use " means to have the advantage of a vehicle as a means of transport, including any period or time between journeys, itself suggests availability. In other words, it is really equivalent to what Mr. Whitworth suggests by the expression " have the use of."

In the present case, as I have said, though this car could not be driven, there is nothing to suggest that it could not be moved. As I pointed out in argument, for all we know it was on the top of a hill and a little boy could release the brake and the car could go careering down the hill. In the absence, at any rate, of a finding that it was immovable as, for instance, the wheels were removed or something of that sort, I cannot bring myself to think that this car was not fairly and squarely within the words which I have used, " have the use of a motor-vehicle on the road."

Mr. Whitworth further contended that even if the car was completely immobilised, an offence would be committed, but I find it unnecessary in the present case to go so far. Here was a car which could be moved, albeit not driven, and, in those circumstances, I think the owner had the use of it on a road within the meaning of the section. I come to the conclusion that the justices were right and I would dismiss this appeal.

CASSELS J. I agree.

EDMUND DAVIES J. I agree.

Appeal dismissed with costs.

Solicitors: *Amery-Parkes & Co.; Speechly, Mumford & Soames for Robert S. Young, Town Clerk, South Shields.*

LONDON LIBRARY *v.* CANE (VALUATION OFFICER) AND OTHERS.

C. A.

1959
Oct. 12, 13, 14;
Nov. 4.

Hodson and Ormerod L.JJ. and Wynn-Parry J.

[LVC/1583/1957.]

Rates and Rating—Science, literature or fine arts—Exemption—Library incorporated by Royal Charter—Subscribing members entitled to borrow books for private study—Annual receipt of donations of money and books and of legacies—Whether instituted for purposes of literature exclusively—"Annual voluntary contribution"—Meaning—Whether supported in part by voluntary contributions—Scientific Societies Act, 1843 (6 *&* 7 *Vict. c.* 36), *s.* 1.

The London Library, which was founded in 1841 and incorporated by Royal Charter in 1933, was a collection of books of literary merit or of value to scholars and students. The members, who paid an annual subscription, were entitled to take books away for perusal at home. The rights conferred on members in general were strictly personal and could not be assigned, but certain members were permitted to act as representatives of certain interested bodies, such as government departments or educational establishments, and the books borrowed by such members might be perused in such establishments by persons interested. The bulk of the library's income was provided by the members' annual subscriptions, but in each year there were extraneous receipts in the form of cash donations, legacies, and gifts of books, amounting in recent years to from 2½ per cent. to 6 per cent. of the total receipts. Since 1877 the library had enjoyed the benefit of de-rating under section 1 of the Scientific Societies Act, 1843, as a body "instituted for purposes of science, literature, or the fine arts "exclusively," and "supported wholly or in part by annual "voluntary contributions."

The Lands Tribunal held that the library did not qualify for exemption under either limb of the section; in particular, it was held that legacies received in different years from different testators were not "annual" contributions, while gifts of books must be excluded from consideration. On appeal:—

Held, dismissing the appeal, (1) that the library was not instituted for the purposes of literature exclusively, as the whole scheme was for the supply of books to members for such use as members chose to make of them, whether for their own instruction or enjoyment or the passing on of the fruits of their study to the public at large.

Birmingham Churchwardens v. *Shaw* (1847) 10 Q.B. 868 not followed.

Inland Revenue Commissioners v. *Forrest* (1890) 15 App.Cas. 334 and *British Launderers' Research Association* v. *Hendon Borough Rating Authority* [1949] 1 K.B. 434, 462; 65 T.L.R. 103, 183; [1949] 1 All E.R. 21 applied.

(2) (post, p. 386). That annual voluntary contributions are voluntary contributions which the society may reasonably expect to receive year by year and upon which it may reasonably rely wholly or in part for the provision of the necessary annual expenditure. In considering whether contributions are annual, it is the receiver who must be considered, and legacies may come to a society with sufficient frequency to justify it in looking to them year by year as probable revenue. In the case of a society such as the library, gifts of books, which helped it year by year to fulfil its purpose, could properly be regarded as contributions within the section (post, p. 387).

Dictum in *Mayor of Liverpool* v. *West Derby Union* (1905) 69 J.P. 277 at 279 disapproved.

(3) That the receipts from donations, legacies and gifts of books, though qualifying as "annual voluntary contributions," were in the material years before the proposal too small in proportion to the total receipts to justify consideration as a partial contribution to the support of the library.

Metropolitan Borough of Battersea v. *British Iron and Steel Research Association* [1949] 1 K.B. 434; 65 T.L.R. 183 applied.

APPEAL from the Lands Tribunal.

The London Library was founded in 1841 by Thomas Carlyle and other literary persons for the purpose, as stated in the Royal Charter of Incorporation granted in 1933, of supplying "the great "want in London of a library embracing every department of "literature and philosophy and from which books might be taken "for use by members in their own homes."

Some 5,000 members paid annual subscriptions and were permitted to remove books to their own homes; their rights were personal and could not be assigned or shared, except that certain members were permitted to act as representatives of bodies, such as government departments or educational establishments, and were permitted to allow the books which they borrowed to be used by the bodies which they represented.

Since 1877 the library had enjoyed exemption from rating under section 1 of the Scientific Societies Act, 1843, but in January, 1957, the local valuation officer made a proposal that the library's premises in St. James' Square, Duke Street, and Mason's Yard should be rated. This proposal was resisted on the ground that the library was a " society instituted for the purposes " of literature exclusively," and was " supported wholly or in " part by annual voluntary contributions."

Ever since its inception the library had restricted itself to the purchase of serious books. The purchasing was initially in the hands of the librarian, himself a professional man of letters, who could have recourse to the views of a committee of eminent scholars and men of letters. The emphasis was on the purchase of books of literary merit or of value to scholars; books of ephemeral interest were not purchased, nor were textbooks on specialised subjects unless they had literary qualities and were intelligible to well-educated laymen. The bulk of the subscribing members were scholars, students, university professors, and the like. The president of the library, the well-known author T. S. Eliot, testified to the benefit which he had received when a young man from his membership of the library, which enabled him to study literature at home in the evenings after a day's work in business.

There were put in evidence accounts in respect of a number of years before the date of the proposal; these indicated that while the bulk of the income was provided by the annual subscriptions, a certain amount was received each year from cash donations, legacies, and gifts of books; such books, if suitable for the library, were retained; if unsuitable, they were sold. Over the five years preceding the proposal the sum of these receipts varied from 2½ per cent. to 6 per cent. of the total annual receipts.

The proposal was confirmed by the Local Valuation Court; an appeal to the Lands Tribunal was dismissed. The tribunal held that the library was not " instituted for the purposes of literature " exclusively " as the whole scheme was to supply books to members for such purposes as they thought fit, whether literary or otherwise; the tribunal further held that the library was not " supported in part by annual voluntary contributions " in that legacies, received in different years from different testators, could not be regarded as "annual," while gifts of books, as opposed to gifts of money, must also be excluded from consideration.

The library appealed.

Geoffrey Lawrence Q.C. and *Frank Stockdale* for the library. While it is clear that the library must show that it is instituted for the purposes of literature exclusively, those purposes are not negatived by the fact that the members pay subscriptions; there must be shown to be a distinct collateral purpose if the claim is to be defeated. A "voluntary" contribution imports something which is altruistic, and it is not limited to something which is the opposite of compulsory. A contribution is "annual" if receipts of that type may be reasonably expected by the recipient over the years, even if irregular in amount, and it is the recipient, not the donor, who must be considered. Over the last 10 years some six per cent. of the library's income has come from donations and legacies, and that satisfies the requirements of the Act.

There is a substantial line of cases which establish that a library such as this is instituted for the purposes of literature exclusively: *Birmingham Churchwardens* v. *Shaw*,[1] followed by *The Queen* v. *Overseers of Manchester*.[2] In *The Queen* v. *Robert Brandt*[3] a different line was taken, but the institution concerned was luxurious and exclusive. In *The Queen* v. *Gaskell*[4] and *Russell Institution* v. *Vestry of St. Giles*[5] the institutions failed because they included newspaper reading rooms, which were held not to be literary. *Earl of Clarendon* v. *Churchwardens of the Parish of St. James*[6] concerned the library itself; the claim for exemption failed only because part of the premises were then let off, but the court, applying the *Birmingham*[7] and *Manchester*[8] cases, upheld the library's contention on the main point, and these three cases have never been overruled. Other cases to the same effect are *Purchas* v. *Churchwardens of The Holy Sepulchre*,[9] *Bradford Library Society* v. *Bradford Churchwardens*[10] and *Liverpool Library* v. *Liverpool Corporation*.[11] *British Launderers' Research Association* v. *Hendon Borough Rating Authority*[12] and *Metropolitan Borough of Battersea* v. *British Iron and Steel*

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[1] (1847) 10 Q.B. 868.
[2] (1851) 16 Q.B. 449.
[3] Ibid. 462.
[4] Ibid. 472.
[5] (1854) 3 E. & B. 416.
[6] (1851) 10 C.B. 806.
[7] 10 Q.B. 868.
[8] 16 Q.B. 449.
[9] (1855) 4 E. & B. 156.
[10] (1858) 1 E. & E. 88.
[11] (1860) 5 H. & N. 526.
[12] [1949] 1 K.B. 434; 65 T.L.R. 183; [1949] 1 All E.R. 21.

Research Association[13] emphasise the effect of the word "exclusively" and show that a society devoted to a proper end is not disqualified because certain means of attaining that end afford pleasure and gratification to the members.

In all the cases where a claim has failed there has been found to be a collateral object, something more than a means to attain a literary end. Literature does not exist in a vacuum; it does not matter in what circumstances it is read, whether in the subscriber's home or in a library reading room. The right to take books home is a furtherance of the literary purpose, as it enables persons who are in work to study at their convenience. [*Plymouth Proprietary Library* v. *Blackman* (*Valuation Officer*)[14] and *Inland Revenue Commissioners* v. *Forrest*[15] were referred to.] The privilege of taking books home is not a purpose in itself; it is a method of achieving the literary purpose of the library. It widens the scope of its influence by including those unable to attend during working hours. There is here that much needed want, a universal library, whose members are enabled to study the world's best literature and to spread its influence by their conversation and writings; the amount of personal amusement or gratification which they receive can only be conjectural.

The meaning of "annual voluntary contributions" was considered in *Overseers of the Savoy* v. *Art Union of London*[16] and the *British Launderers'* case[17]; "voluntary" means gratuitous, and is not the opposite of compulsory; the contribution must not be given for a consideration or the acquisition of a private advantage; the question is whether it is a matter of business or of bounty, though a small measure of personal advantage is allowable. In considering what are "annual" contributions one must have regard to a number of years; any class of voluntary gift which the society may expect to receive with some regularity is "annual." It is the recipient and not the donor who must be considered; the library has a steady receipt of legacies year by year, though of course a legacy is only received once from one testator; there is no authority on the point, but in principle it is submitted that legacies qualify for inclusion. Then there is an important item in gifts of books, averaging some £700 in value in recent years. The tribunal felt bound to reject this item on the authority of *Mayor of Liverpool* v. *West Derby Union*.[18] but it is submitted that it is quite wrong to hold that a library may not be supported by gifts of books in kind, and that case should be overruled. There should also be taken into account the investment income attributable to funds created by legacies, and some of the rental relief attributable to donations and legacies applied towards meeting the cost of building. [*Royal Academy of Dancing* v. *Kerridge* [19] was referred to.]

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[13] [1949] 1 K.B. 434.

[14] (1957) 50 R. & I.T. 334.

[15] (1890) 15 App.Cas. 334; 6 T.L.R. 456.

[16] [1896] A.C. 296; 12 T.L.R. 377.

[17] [1949] 1 K.B. 434.

[18] (1905) 69 J.P. 277.

J. P. Widgery Q.C. and *Patrick Browne* for the valuation officer. It is now thoroughly established that the purposes of a society must be "exclusively" literary; "primarily" or "chiefly" will not do: see the *British Launderers'* case.[20] Since *Forrest's* case [21] the mid-nineteenth century cases are no longer of authority; they assume that the test is the primary purpose and not the exclusive purpose, and they all spring from the *Birmingham* case,[22] where the matter went by admission and was not necessary for the decision; they are, moreover, difficult to reconcile among themselves.

The court must distinguish carefully between the tribunal's decisions on law and fact. The tribunal first held in law that the charter extends beyond the promotion of literature, and then as a fact that the activities were in accordance with the charter and were therefore outside the scope of the Act; that finding is not open to review. Both decisions were correct; the charter contemplates an extension of the original objects, so the matter must also be judged by the activities carried on. The charter does not exclude personal benefits to members; it displays no exclusive desire to benefit literature by (e.g.) encouraging authors and teaching and disseminating literature among the public.

As to the meaning of "annual voluntary contributions," there is no authority on the meaning of "annual" in the present context, but it has been interpreted in Revenue cases, as in *Moss' Empires Ltd.* v. *Inland Revenue Commissioners.*[23] It may be looked at from the point of view of the recipient, so long as the type of contribution is recurrent or capable of being recurrent, and it is not necessary that the same persons should contribute every year. Then the society must be "supported," which means that the society must rely on the contributions for the continuance of its work, and that they must be on a substantial scale and regularly received. [*Nonentities Society* v.

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[19] (1958) 51 R. & I.T. 267.

[20] [1949] 1 K.B. 434.

[21] 15 App.Cas. 334.

[22] 10 Q.B. 868.

[23] [1937] A.C. 785; [1937] 3 All E.R. 381.

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London Library v. Cane.

Linley[24] was referred to.] A contribution of a capital nature (e.g., to a special building fund) cannot qualify. The period to be considered must be a reasonable one, depending on the circumstances, but to take a 10-year average is too long, as it includes exceptional years.

Legacies cannot be included, as they cannot be regarded as recurring; alternatively, they should be assessed individually to determine whether they might be regarded as revenue items or as special gifts for capital purposes. Investment income and sums attributable to rental relief cannot be regarded as qualifying. Gifts of books may properly be included if they relieve the revenue and are of the kind which the library would have bought anyway. The quantum of all allowable contributions must be substantial in proportion to the total revenue. Taking an average may lead to a misleading result owing to exceptional receipts in certain years. Regard should be had to each of the years immediately preceding the proposal to see whether substantial contributions in every year is the general pattern. If averaging is resorted to, it should be resorted to for a limited period of, say, five years preceding the proposal. Adopting that course, the maximum allowable figures would indicate an average of about three per cent. of the total receipts, which is far too small to be regarded as "substantial."

Reginald W. Bell for the local rating authority, the Westminster City Council. In general the arguments presented for the valuation officer on both issues are adopted. In *In re Prevost*[25] the position of the library under the Literary and Scientific Institutions Act, 1854, came up for consideration, and it was held to be a mutual benefit society. The express prohibition of the lending of books by members negatives any claim to promote literature in general. The question whether a contribution is "annual" must be regarded from the point of view of the contributor; the word qualifies "contributions" and not "supported"; an annual contribution is something which may be expected from the same source year after year. A gift of books is not within the Act; *In re the Duty on Estate of New University Club*[26] indicates that contributions should be in cash; it is difficult to see how a gift of books "supports" the library, in that it could do without such a gift.

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[24] (1954) 47 R. & I.T. 426.

[25] [1930] 2 Ch. 383.

[26] (1887) 18 Q.B.D. 720.

Lawrence Q.C. in reply. In the Victorian cases, where the applicants failed, there was a collateral purpose for the convenience of the members; this is a benevolent statute and should be benevolently construed. It is absurd to contend that the Act can apply only to a library where costly books are kept in a sealed room; a library is not a sterile collection, but something to disseminate and propagate literature. The case for the valuation officer goes to the length that the Act does not apply unless the doors are kept open only on account of the support of regular contributions; what is required is that such contributions should produce with regularity such a measure of support as is not to be ignored under the de minimis rule. Gifts in kind are particularly appropriate to an institution such as this and are plainly a factor of support.

Cur. adv. vult.

November 4. HODSON L.J. The judgment which I am about to read is the judgment of the court.

The question in this appeal is whether the London Library is liable to be assessed for the purpose of rating or whether it is exempt from rates under the provisions of the Scientific Societies Act, 1843. Section 1 of the Act, so far as material to this appeal, is as follows: "No person or persons shall be assessed or rated, "or liable to be assessed or rated . . . in respect of any land, "houses, or buildings . . . belonging to any society instituted for "purposes of science, literature, or the fine arts exclusively . . . "provided that such society shall be supported wholly or in part "by annual voluntary contributions . . ."

The proposal for rating of the London Library was made on January 24, 1957, and the assessment was confirmed on August 21, 1957, by the local valuation court for Central London. The appeal by the London Library to the Lands Tribunal was dismissed on July 29, 1958, by the president, from whose decision this appeal is brought.

The history of the library is fully set out in the decision of the Lands Tribunal and need not be repeated. It has, in fact, for many years been exempt from rates on the ground that it is instituted for the purposes of literature exclusively and fulfils the other requirements of the Act of 1843.

The appellants contend that while it is clear that the object of the library must be exclusively for the enhancement, promotion and dissemination of literature, the fact that the members pay an annual subscription does not destroy the exclusiveness of the objects. They submit that the means employed by the library for attaining those objects do not disqualify provided the means. as they say is the case of those employed by the library, do not amount to a distinct collateral object.

A number of cases decided in the middle of the last century were cited in support of the contention that the London Library was not disqualified by reason of its having a collateral object in addition to the object of the promotion of literature. These authorities begin with *Birmingham Churchwardens* v. *Shaw*,[1] where the question at issue was never challenged, followed expressly in 1851 in *The Queen* v. *Overseers of Manchester*.[2] In the same volume of the Queen's Bench reports there are also *The Queen* v. *Brandt* [3]; *The Queen* v. *Gaskell* [4]; and *The Queen* v. *Cockburn*.[5] In the same year there was the case of *Earl of Clarendon* v. *Churchwardens of the Parish of St. James*,[6] which related to the London Library itself.

In all these cases (except that of *Brandt*) the court found itself bound by the *Birmingham* case, which is scarcely distinguishable from the present, to come to a conclusion which would be favourable to the appellants here.

On the other hand, there are passages in the earlier cases which lead one to the conclusion that the attention of the court was not always focused on the word "exclusively" in the statute. Compare Lord Campbell's observations in the *Manchester* case [7] to the effect that the members seemed not to have for their "chief" object their own recreation and amusement. In the *Brandt* case [8] he referred to the "principal" object which the members had in view, although in *Cockburn's* case,[9] the last of the series, he referred to the fact that the statute had anxiously introduced the word "exclusively" both into the preamble and the enactment.

If there was any misconception about the effect of the statute it was laid at rest by the House of Lords in *Inland Revenue Commissioners* v. *Forrest*.[10] Lord Watson, referring to section 1 of the Act of 1843, said: "Then it is not sufficient compliance with "the plain language of the Act that a society be established "chiefly for the purpose of promoting science, literature or the

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[1] (1847) 10 Q.B. 868.
[2] (1851) 16 Q.B. 449.
[3] Ibid. 462.
[4] Ibid. 472.
[5] (1852) Ibid. 480.
[6] (1851) 10 C.B. 806.
[7] 16 Q.B. 449, 458.
[8] Ibid. 462, 468.
[9] Ibid. 480, 491.
[10] (1890) 15 App.Cas. 334, 348; 6 T.L.R. 456.

"fine arts. One or other of these must be its exclusive object; "so that an institution which also contemplated some other, "though altogether subsidiary object, could not claim the benefit "of the exemption."

The principle there stated has been enunciated clearly in this court in the case of *British Launderers' Research Association* v. *Hendon Borough Rating Authority*,[11] where Denning L.J. used the following words: "There is one thing which is clear both on "the wording of the statute and on the cases. The word "'exclusively' must be given its full effect. It is not sufficient "that the society should be instituted 'mainly' or 'primarily' "or 'chiefly' for the purposes of science, literature or the fine "arts. It must be instituted 'exclusively' for those purposes. "The only qualification—which, indeed, is not really a qualification at all—is that other purposes which are merely incidental "to the purposes of science and literature or the fine arts, that is, "merely a means to the fulfilment of those purposes, do not "deprive a society of the exemption. Once, however, the other "purposes cease to be merely incidental but become collateral; "that is, cease to be a means to an end, but become an end in "themselves; that is, become additional purposes of the society; "then, whether they be main or subsidiary, whether they exist "jointly with or separately from the purposes of science, literature or the fine arts, the society cannot claim the exemption. "That is, I think, made quite clear by the opinions of Lord "Watson and Lord Macnaghten in *Inland Revenue Commis-* "*sioners* v. *Forrest*."[12]

There is no real dispute between the parties as to the approach to the problem, and it is recognised that in so far as the society serves individual members, it must do so incidentally and not as an end in itself in order to claim exemption.

The only question is whether on the true construction of the charter the appellants can contend that the object of the library is literature exclusively, for no question here arises of activities of the society outside the scope of the charter. The charter recites: "That the association or society now existing and known "as the 'London Library' was established in the year 1841 by "Thomas Carlyle and other eminent persons under the patronage "of H.R.H. the late Prince Consort to supply the great want in "London of a library embracing every department of literature

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[11] [1949] 1 K.B. 434, 467; 65 T.L.R. 183; [1949] 1 All E.R. 21.

[12] 15 App.Cas. 334, 348, 354.

"and philosophy and from which books might be taken for use by "members to their own homes."

Reference to the by-laws, which again are set out in full in the decision of the president, shows that the advantages of the society are restricted to members. No doubt, since many of the members are corporate bodies, through those bodies a large number of persons other than individual members may have access to the volumes of literature contained in the library, but the tangible benefits of the library are restricted to the members themselves. The relevant findings of fact contained in the president's decision are as follows: "What then is the true purpose of this library? "I think the answer is to be found in the first paragraph of the "charter: '. . . a library embracing every department of literature and philosophy and from which books might be taken for "'use by members to their own homes.' And the provision "imposed by the library 'A member's rights are personal and "'cannot be assigned or shared.' All the evidence confirms that "in their use of the hereditament the society has rigorously "adhered to the terms of their charter and has ensured the practical application of those terms by their by-laws and circulars "to members and prospective members. In no place in either "the by-laws or circulars is any concern displayed by the society "as to what use the members should make of those books except "of course to return them in good condition. In the hands of "some members the books may be the means of disseminating "the priceless gifts of literature to the general public. That "may be, indeed probably is, the pious hope of the committee "but it is not the main aim of the committee; that aim, as I see "it, is to supply the books to the members for use as those "members see fit, be that use their own personal gratification or "the passing on of the fruits of their literary genius to the general "public. If I have thus correctly interpreted the charter and bylaws, and the actual activities of the society as disclosed by the "evidence, how can I say that the primary purpose is not the "convenience of its members?"

As the president pointed out, the books may, in the hands of some members, be the means of disseminating literature to the public. At the same time, this is not the object of the society, which, though it may be said to be instituted for the purposes of literature, cannot be said to have been instituted for this purpose exclusively, when the whole scheme of the charter and by-laws made thereunder from which the society has never strayed is that the books of the library are to be supplied to members for such use as the members choose to make of them, whether it be for their own instruction or enjoyment, or the passing on of the fruits of their study to the public at large. In view of the president's findings of fact as to the activities of the society, which are, we think, plainly within the terms of the charter correctly construed by him, the appellants cannot succeed.

We find ourselves in agreement with Eve J. in the case of *In re Prevost*,[13] in a passage which was material to the conclusion which he reached in the matter under his consideration, when he said of the London Library "that the library is not a charity but "an institution for mutual benefit."

Accordingly, we cannot hold that the benefits to the members are not the object of the library, and can be treated as if they were no more than incidental to the object of literature.

The president has held further that the London Library was not supported wholly or in part by "annual voluntary contributions," and we have been asked to deal with this topic also, although we agree with his view on the first part of the case.

If a society is to be exempt from rating under section 1 of the Scientific Societies Act, 1843, it must satisfy the court that it is supported wholly or in part by annual voluntary contributions. This society has submitted that it is so supported, and has submitted figures of its income from all sources for the 10 years prior to January 28, 1957, the material date. The president was of the opinion that only a small part of the amount submitted could be regarded as derived from annual voluntary contributions, and that the proportion of these to the total income of the library was too small to be considered to be partly supporting the society.

There was really no dispute between the parties as to whether the sums contended for by the society supported the society, provided that they were sufficiently large, or whether they were voluntary. For the law on these matters reference was made to *Metropolitan Borough of Battersea* v. *British Iron and Steel Research Association*,[14] where Denning L.J. said: "A society is "only supported in whole or in part by voluntary contributions "if it has to rely on them for the continuance of its work. The "sum of £2,000 is too small a proportion of the whole income "(£99,474) to enable that inference to be drawn." Jenkins J. in the same case said[15]: "The substance of each case must be

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[13] [1930] 2 Ch. 383, 386.

[14] [1949] 1 K.B. 434, 462; 65 T.L.R. 183; [1949] 1 All E.R. 21.

[15] [1949] 1 K.B. 434, 457.

"looked at to see whether the payments claimed to be voluntary "contributions are in substance made as a matter of business or "as a matter of bounty." Later on the same page he goes on to say: "A reasonable construction must be placed on the section, "and I think it requires that the association should be dependent "for its support either wholly or to something more than a "merely nominal extent on voluntary contributions." Somervell L.J., in *Nonentities Society* v. *Linley*,[16] cited these passages and went on to say: "I am not saying that that, or perhaps any "possible construction of the statute, leaves a very easy or "satisfactory issue of fact to be determined by the tribunal of "fact, but it does, I think, decide that the voluntary contribu-"tions must be a substantial element in the finance of the under-"taking, and it also lays down that it is to be decided prima "facie by a comparison between the amount of the voluntary "contributions and the gross income of the undertaking." Whether such a proportion is "substantial" may again be a difficult question of fact. Mr. Lawrence has submitted that the proviso is satisfied if the contributions are not so small as to come within the "de minimis" rule, and we think that a reasonable statement of the principle laid down by Denning L.J. and Jenkins J., and accepted by Somervell L.J.

The chief discussion on this part of the case was whether many of the payments, for example legacies, submitted for consideration by the appellants could come within the description of "annual." It was submitted by the appellants, both before this court and before the tribunal, that the word "annual" should be interpreted as applying to the receiver as well as to the giver. Mr. Widgery, on behalf of the valuation officer, accepted this view to some extent, but submitted that annual contributions must have the quality of being recurrent, or be capable of being recurrent, although not necessarily from the same source. He submitted that legacies, for instance, described by the president as "once "for all" payments, could not come within the definition if his submission was right. Mr. Bell, on behalf of the respondent authority, supported the stricter view that "annual" should apply to the giver only, that a contribution should be one the annual recurrence of which from the same source might reasonably be expected. The president accepted this last view. He said: "It seems to me that where the section refers to 'annual

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[16] (1954) 47 R. & I.T. 426, 428.

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"'voluntary contributions' it means annual by the contributor." We do not feel able to accept this view.

In our judgment, the receiver must be considered when deciding whether contributions are annual. There are many ways in which a society may be voluntarily supported. It may, in the first place, be founded and endowed by the provision of a fund, by a single benefactor or otherwise, the interest on which is enough to provide for its continued support. Such support, in our view, would be outside the scope of the definition. On the other hand, it may look for support, not only to regular annual subscriptions, but to the proceeds of street collections, and the many other ways of raising money for charities and similar organisations. It may well be that legacies of varying amounts are left to the society from time to time. Clearly, a legacy will come only once from a particular person, but legacies may come to a society with sufficient frequency to justify it in looking to them year by year as probable revenue. We are not, of course, considering legacies of large sums which the tribunal might think should properly be regarded as capital endowment. Annual voluntary contributions are, in our judgment, voluntary contributions which the society may reasonably expect to receive year by year, and upon which it may reasonably rely wholly or in part for the provision of the necessary annual expenditure of the society.

The appellants produced to the tribunal a schedule showing the sums which it was contended should be treated as annual voluntary contributions. The figures produced were for the 10 years prior to the material date, and a yearly average was taken and compared with the yearly average of the total revenue. This showed a percentage which the appellants contended was sufficient to show that they relied on these payments for partial support. It was submitted by Mr. Widgery that to take an average was not the method best designed to give a true picture of the position. He contended that the figures should be examined for the years immediately prior to the material date to see whether in each of these years there were voluntary contributions sufficient to be taken into consideration, and that, unless there were such payments, the society should not have the benefit of the section. It did appear from the figures submitted by the appellants that the five years prior to the material date showed a reasonably consistent pattern, and we were of the opinion that the proper way to approach the matter was to consider the figures for these five years in the manner submitted by Mr. Widgery.

There were, however, three other items of figures which the appellants contended should be included in the calculation of annual voluntary contributions. One item was a proportion of investment income attributable to funds created by legacies, and the second was for a proportion of rental relief attributable to donations and legacies of members applied to building costs. Neither of these items could, in our view, be included, as they could not in any way be regarded as annual contributions. The third item, however, was in a different category. It appears that the society receives annually gifts of books from publishers and other persons. These are considered by the librarian, and the ones he thinks suitable for the library are retained and the remainder sold. The estimated average value of these gifts for the three years prior to the material date was £700, and the appellants claimed that this sum should be included in the sum of annual voluntary contributions. The president said that he found it difficult to distinguish between a gift of books and annual sums of money for the purchase of books, but considered himself bound by the decision of the Divisional Court in the case of *Mayor of Liverpool* v. *West Derby Union*,[17] where Kennedy J. said: "To treat a "gift of books to an institution as a voluntary contribution would "hardly seem to me to come within the fair meaning of the Act." We do not feel able to accept that view. The library exists, as its name implies, as a collection of books for use in the manner prescribed by its charter. In order properly to fulfil its purpose it must be kept up to date by buying new books as they are published, provided, of course, that they come within the classification of books with which the library is concerned.

We are unable to see why gifts of this kind, which help the library year by year to fulfil its purpose, should not be regarded as contributions because they are gifts in kind and not in money. It may be, of course, that a gift might be made to the library of a rare book of great value. It is not suggested that this has occurred in the years under consideration, and it is unnecessary, therefore, to express a view upon it, except to say that a gift in such a case might in certain circumstances be regarded rather in the nature of a capital endowment than a contribution to which the society might look for its partial support year by year.

It appears then on the facts before the court that the sums the appellants are entitled to regard as annual voluntary contributions are (a) donations of money, (b) legacies, and (c) gifts of

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[17] (1905) 69 J.P. 277, 279.

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books. Treating the sum of £700 as the average sum to add to the income of the years 1952–53 and 1953–54 as well as to the three following years, the approximate percentages of the annual voluntary contributions for the five years from 1952–53 to 1956–57, both inclusive, appear to be 2½ per cent., 4 per cent., 3 per cent., 3 per cent. and 6 per cent. respectively. In our view, these sums, looked at year by year, are not sufficiently large to enable us to come to the view that they contribute partially to the support of the society.

The appeal, therefore, is dismissed.

Appeal dismissed; appellant to pay half the costs to each respondent; leave to appeal.

Solicitors: *Gedge, Fiske & Co.; Solicitor of Inland Revenue; Allen & Son.*

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Oct. 12, 13, 14;
Dec. 1.

Hodson and Ormerod L.JJ. and Wynn-Parry J.

INSTITUTION OF MECHANICAL ENGINEERS *v.* CANE (VALUATION OFFICER) AND WESTMINSTER CITY COUNCIL.

[LVC/183/1956.]

Rates and Rating—Science or fine art—Exemption—Society "to promote the development of mechanical engineering"—Supported mainly by annual subscriptions—Whether instituted for purposes of science exclusively—Whether subscriptions voluntary—Scientific Societies Act, 1843 (6 *&* 7 *Vict. c.* 36), *s.* 1.

The Institute of Mechanical Engineers was founded in 1847 as a voluntary association and later incorporated by Royal Charter, the object being "to promote the development of mechanical engineering "and to facilitate the exchange of information and ideas thereon," for which purpose the institute was empowered to encourage invention and research, to hold meetings for reading and discussing communications, to distribute proceedings, reports and papers, to co-operate with educational bodies and to do other things conducive to the attainment of its object.

Membership of the institution was of great advantage to engineers, as they had the benefit of the educational facilities provided, of associating with other members of the profession, of receiving the reports of proceedings and other publications, and of enjoying a special professional status by virtue of their membership. The income of the institution was some £168,000, of which £138,000 came from members' subscriptions and the balance from investment income, sale of publications, and other sources. The cost of the publications distributed to members was about 30 per cent. of the annual subscriptions.

The local valuation officer made a proposal that the premises of the institution should be included in the valuation list on the ground that it was not entitled to the benefit conferred by section 1 of the Scientific Societies Act, 1843, as a society "instituted for "purposes of science exclusively" and "supported wholly or in "part by annual voluntary contributions." The Lands Tribunal held that the institution was entitled to the benefit of the section, as the object was a purpose of science, and the subscriptions of the members of such an institution ought to be regarded as voluntary unless the value of the publications received approximated closely to the amount of the subscriptions. On appeal:—

Held, allowing the appeal, (1) that the institution was not formed for purposes of science exclusively. The term "mechanical "engineering" included not only the science, but the practice and technique of engineering, which were separate and distinct purposes (post, pp. 399, 405).

Observations in *Royal College of Surgeons of England* v. *National Provincial Bank Ltd.* [1952] A.C. 631; [1952] 1 T.L.R. 978; [1952] 1 All E.R. 984 applied.

(2) That the institution was not supported by voluntary contributions, as the subscriptions of the members were not "voluntary" within the meaning of the Act. "Voluntary" was not in this context the opposite of "compulsory," and in considering this question regard must be had to the motive inducing members to join, as opposed to the purpose of the institution (assuming it to be scientific); and to the question whether members joined from disinterested motives without looking to any professional advantage in return. In the present case the substantial professional benefits conferred by membership were an inducement to join (post, p. 411).

Overseers of the Savoy v. *Art Union of London* [1896] A.C. 296; 12 T.L.R. 377 and *Inland Revenue Commissioners* v. *Forrest* (1890) 15 App.Cas. 334 applied.

Birmingham Churchwardens v. *Shaw* (1849) 10 Q.B. 868 disapproved.

APPEAL from the Lands Tribunal.

The Institution of Mechanical Engineers was founded in 1847 as a voluntary association, and was granted a Royal Charter in April, 1930. Clause 7 of the charter provided: "The objects and "purposes for which the institution is hereby constituted are to "promote the development of mechanical engineering and to "facilitate the exchange of information and ideas thereon and for "that purpose: (A) To encourage invention and research in

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"matters connected with mechanical engineering and with this "object to make grants of money or books or otherwise to assist "such invention and research. (B) To hold meetings of the "institution for reading and discussing communications bearing "upon mechanical engineering or the application thereof or upon "subjects relating thereto. (C) To print publish and distribute "the proceedings or reports of the institution or any papers "communications works or treatises on mechanical engineering "or its application or subjects connected therewith. (D) To "co-operate with universities, other educational institutions and "public educational authorities for the furtherance of education "in engineering science or practice. (E) To do all other things "incidental or conducive to the attainment of the above objects "or any of them."

It was claimed and acknowledged that membership of the institution was of great value to persons practising as mechanical engineers, who received substantial corporate benefits by way of examinations for student or graduate membership, the receipt of the proceedings of the institution and other scientific and technical publications, and opportunities for associating with other members of the profession, and the members enjoyed a special professional status. The income of the institution for the year 1955 was some £168,000, of which some £138,000 was derived from members' annual subscriptions and the balance was provided by income of invested funds, sale of proceedings, examination fees and rents. The cost of the publications distributed to members represented about 30 per cent. of the total annual subscriptions.

The institution had enjoyed exemption from rating under section 1 of the Scientific Societies Act, 1843, as a society "instituted for purposes of science exclusively" and "supported "wholly or in part by annual voluntary contributions." In 1956 a proposal was made by the local valuation officer that the premises of the institution in Westminster should be rated; this was confirmed by the local valuation court, but an appeal to the Lands Tribunal was allowed. The tribunal held, first, that the object as stated in clause 7 of the charter was a purpose of science, paragraphs (A) to (E) of the clause being ancillary to that purpose in that they indicated the means by which that object could be achieved. Secondly, the tribunal held that the institution satisfied the requirement that it should be supported by annual voluntary contributions; in so doing the tribunal applied what was termed a "local rule" that subscriptions to such societies did not cease to be voluntary unless the value of the publications received by the members approximated closely to the amount of the subscriptions, which was not the fact in the present case. The valuation officer and the local rating authority appealed.

Maurice Lyell Q.C. and *Patrick Browne* for the valuation officer. The first question is whether the institution is instituted for the purposes of science exclusively, and that depends on the construction of the phrase in the charter "to promote the "development of mechanical engineering." "Mechanical engin-"eering" is a phrase apt to cover a science, an art, or trade, or industry or profession, and that the institution so regard it is evident from the publications which are before the court and from the verbal evidence. The scope of the objects of the institution is much wider than the objects in two cases where they were purely scientific: *Institute of Fuel* v. *Morley*[1] and *Society of Chemical Industry* v. *Cane*.[2] The phrase in question is not "the science of mechanical engineering," which would be the equivalent of the language used in a number of other cases; the details of sub-paragraphs (A) to (E) indicate technical and practical objects which are much wider than science. Valuable guidance in the consideration of such a question can be had in the judgments in *Metropolitan Borough of Battersea* v. *British Iron and Steel Research Association*[3] and *British Launderers' Research Association* v. *Hendon Borough Rating Authority*,[4] which indicate the differences between scientific and technical education and purposes. Where words have a double meaning, the court, to resolve a possible ambiguity, may look at the activities of those who act in pursuance of the words, assuming that they are acting intra vires: see *Watcham* v. *Attorney-General of East Africa Protectorate*.[5] If "mechanical engineering" is given the strict sense for which the institution contends, the furtherance of technical education would be ultra vires. The transactions and other publications show that much of the activity of the branches is concerned with commercial, practical and manufacturing matters, which are all perfectly proper and intra vires if the words of the charter receive their natural wide meaning. Activities such as the preparation of model forms of contract and the establishment of an appointments bureau have nothing to do with science.

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[1] [1956] A.C. 245; [1956] 2 W.L.R. 64; [1955] 3 All E.R. 843.

[2] (1956) 54 L.G.R. 496; [1956] Ryde's Rat.Cas. 106.

[3] [1949] 1 K.B. 434; 65 T.L.R. 183.

[4] Ibid.

[5] [1919] A.C. 533; 34 T.L.R. 481.

The next question is whether the members' subscriptions can be regarded as "annual voluntary contributions." On this question the principle is laid down in *Overseers of the Savoy* v. *Art Union of London*,[6] which shows that it is necessary to look at the motives which induce the members to join, and that members' subscriptions do not qualify unless there is a bare minimum of consideration. Here there can be no question of anything altruistic or gratuitous in the payment of the subscriptions; the members receive not only valuable publications but a most valuable professional status; other relevant cases are *Inland Revenue Commissioners* v. *Forrest*,[7] *Institution of Civil Engineers* v. *Inland Revenue Commissioners*[8] and the *Battersea* and *British Launderers'* cases,[9] where the test of "business" or "bounty" was propounded. In order to qualify to pay the subscription which is claimed to be paid as a matter of bounty, the intending payer has to pass examinations and undergo practical training. Persons who thereby acquire a professional status do not pay their subscriptions out of altruism but for the benefits they receive.

R. W. Bell for the local rating authority. The Act throws burdens on other ratepayers, so any claim for exemption should be examined strictly. It is submitted (1) that, on the plain words of the charter, the institution is established for purposes much wider than science; (2) that the activities pursued are not wholly scientific; (3) that the subscriptions are not voluntary, as (a) they are motivated by business and not bounty, and (b) because they are compulsory.

There is no reason to interpret the charter in other than a natural way; its language would justify such a proceeding as the erection of a factory in order to test the possibility of certain processes. Such an activity could not be prevented by injunction on the ground that it was ultra vires. The terms of the charter should be compared with those of the Institution of Civil Engineers set out in *Forrest's* case[10]; that charter covered the general advancement of mechanical science, so that the later charter now being considered must cover something wider. If it is construed naturally, the activities carried on are intra vires; if narrowly, many are ultra vires, such as the promotion of certain forms of education, the drafting of contracts and the establishment of an appointments bureau. Further, these objects are not means to ends, but ends in themselves; they cannot be mere means for the advancement of science.

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[6] [1896] A.C. 296; 12 T.L.R. 377.

[7] (1890) 15 App.Cas. 334.

[8] [1932] 1 K.B. 149; 47 T.L.R. 466.

[9] [1949] 1 K.B. 434.

[10] 15 App.Cas. 334, 345.

The subscriptions are not annual voluntary contributions, as motive is an important element, and there are overwhelming professional reasons why members should join the institution. Further, the subscriptions should be regarded as compulsory; there has been some misunderstanding of the *Art Union* case,[11] which has led to the view that the element of compulsion is immaterial and that a covenanted subscription is not compulsory because the agreement under which it is paid was entered into voluntarily; that is wrong: see *In re Duty on Estate of New University Club*.[12]

W. L. Roots Q.C. and *F. A. Amies* for the institution. On a proper reading of the charter the institution should be considered as exclusively instituted for science. In the petition for the charter mechanical engineering was referred to as "that "science," so that it was unnecessary to repeat the word "science" in the charter itself; there is nothing in the dictionary definitions which indicates that "mechanical engineering" imports a profession or industry. The activities of the institution should not be regarded as widening the construction to be given to the charter; any activities which might not be regarded as scientific should be regarded as means to a scientific end, or possibly as ultra vires. The Charter of the Institution of Civil Engineers (which has been held to be instituted for the purposes of science exclusively) contains the words "the general advance- "ment of mechanical science": see *Institution of Civil Engineers* v. *Inland Revenue Commissioners* [13]; the mere presence or absence of the word "science" cannot alter the character of the institution concerned. The phrase "mechanical engineering" does not necessarily import either a profession or an industry; observations in *Society of Chemical Industry* v. *Cane* [14] show that a purpose can remain scientific even though there must be some impact on industry; the pursuit of applied science must necessarily promote industry.

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[11] [1896] A.C. 296.

[12] (1887) 18 Q.B.D. 720.

[13] [1932] 1 K.B. 149, 158; 47 T.L.R. 466.

[14] 54 L.G.R. 496.

It has been submitted that the evidence shows a wide range of non-scientific activities, in the nature of many of the papers appearing in the published proceedings, the educational activities, publication of codes of professional practice, of draft contracts, and the institution of an appointments bureau. In considering these activities it must be realised that there must be a practical as well as a scientific side of the institution's activities; engineers need to apply their science and need to be educated how to apply it; the codes of practice are made with a view to attain uniformity and reliability in the members' designs and are arrived at as the result of scientific research. The contracts enable engineers to operate satisfactorily in accordance with legal principles; the appointments bureau is an entirely separate body and not part of the institution.

On the question whether the subscriptions are voluntary contributions, in the cases where the facts have been related to the amount of gain enjoyed, the decisions have usually turned on the question of compulsion; it is not enough to establish that there was no compulsion; there must not be material gain. There is a half-way house between business and bounty; here the members can take part in scientific discussions and take advantage of their respective experience and knowledge, and of course gain benefit thereby. The *New University Club* case,[15] already cited, shows that scientific societies are in a very different category from social clubs, and *O'Sullivan* v. *English Folk Dance and Song Society*[16] shows that the distinction between business and bounty is one of degree and fact, and, accordingly, essentially one for the tribunal below. The fact that a member may obtain some benefit does not prevent the contribution from being voluntary. The evidence of fact sought to be adduced to prove an extraneous motive is very limited, and it was shown that a high position in engineering could be obtained without being a member of the institution. As to the publications, no one would go through all the trouble of training to become a member of the institution merely to get the publications at a slightly cheaper rate. [*Churchwardens of St. Anne* v. *Linnean Society*[17] was referred to.]

Amies following. It is absurd to suggest that the terms of the charter mean that the institution can build an experimental factory, or indulge in industrial enterprise, and there is nothing in the objects clause which enables the institution to promote the professional interests of members. It has been objected that the terms of the charter permit the promotion of the practice of engineering, but in *Institute of Fuel* v. *Morley*[18] one of the objects was the advancement of the knowledge and practice of fuel technology, and the appeal of the institute was successful; *Society of Chemical Industry* v. *Cane*[19] is to the same effect.

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[15] 18 Q.B.D. 740.

[16] [1955] 1 W.L.R. 907; [1955] 2 All E.R. 845.

[17] (1854) 3 E. & B. 793.

There is a finding of fact that the institution has not been furthering the interests of the members, and that should not be upset by suggestions now made; *Institution of Civil Engineers* v. *Inland Revenue Commissioners*[20] indicates that what is done for the members is immaterial. As to education, the *Battersea* case[21] shows that technical education includes scientific education. There has been a finding of fact that these contributions are voluntary, and so the only question before the court is whether there is any evidence to support that finding, and there is ample evidence to that effect.

Lyell Q.C. in reply. The question is, what may the institution do under its charter without exceeding its powers? If the Act is to apply, the activities must be directed to the development of science only. The expression "development of mechanical "engineering" must be construed according to the ordinary meaning, and full effect must be given to that meaning: see *Camden (Marquis)* v. *Inland Revenue Commissioners.*[22] Development here includes the promotion of the science, the art, the practice and the industry. There is great emphasis on technical education, which promotes the practical efficiency of the industry; this question receives much enlightenment from *Royal College of Surgeons of England* v. *National Provincial Bank Ltd.*,[23] which shows that there is a clear distinction between the promotion of science and of education, and that technical education is not a means of promoting science.

On the question whether the subscriptions are annual voluntary contributions, the proper tests are set out in the *Art Union* case.[24] The publications of the institution show that membership confers most substantial benefits on the members, and appeals widely to self-interest, and *Forrest's* case[25] shows what professional advantages can be gained from the membership of such an institution. The Revenue particularly wish to contest

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[18] [1956] A.C. 245.
[19] 54 L.G.R. 496.
[20] [1932] 1 K.B. 149.
[21] [1949] 1 K.B. 434.
[22] [1914] 1 K.B. 641
[23] [1952] A.C. 631; [1952] 1 T.L.R. 978; [1952] 1 All E.R. 984.
[24] [1896] A.C. 296.
[25] 15 App.Cas. 334.

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the tribunal's so-called "local rule," that where the value of the publications received constitutes only a small proportion of the subscriptions, the latter are voluntary. Not only does such a rule ignore the principles laid down in the two cases just cited, but in the present case the value of the publications issued amounts to about 30 per cent. of the amount of the subscriptions, which is quite a substantial proportion.

Cur. adv. vult.

Dec. 1. HODSON L.J. The judgment which I am about to read is the judgment of the court, and is a composite judgment.

These appeals are from a decision of the Lands Tribunal dated March 11, 1958, allowing an appeal from a decision of the local valuation court for Central London given on August 9, 1956, confirming an assessment for the purpose of rating of a hereditament owned and occupied by the respondents.

The question at issue is whether the respondents are entitled to exemption from rating under the provisions of the Scientific Societies Act, 1843, section 1 of which reads as follows: "(1) No "person or persons shall be assessed or rated, or liable to be "assessed or rated, or liable to pay, to any county, borough, "parochial, or other local rates or cesses, in respect of any land, "houses, or buildings, or parts of houses or buildings, belonging "to any society instituted for purposes of science, literature, "or the fine arts exclusively, either as tenant or as owner, and "occupied by it for the transaction of its business, and for carrying into effect its purposes, provided that such society shall be "supported wholly or in part by annual voluntary contributions "and shall not, and by its laws may not make any dividend, "gift, division or bonus in money unto or between any of its "members and provided also that such society shall obtain the "certificate of the barrister-at-law or lord advocate, as hereinafter mentioned."

Before the Lands Tribunal it was contended by the respondents (1) that the institution was formed for the purpose of science exclusively; and (2) that it was supported wholly or in part by annual voluntary contributions. The Lands Tribunal upheld the respondents' contentions and allowed their appeal.

The first question for consideration is whether on a true construction of the charter it can be said that the respondent society, hereafter referred to as the institution, was formed for the purposes of science exclusively. If the answer to this question is in the negative, then clearly this appeal must be allowed. If, on the other hand, we should come to the conclusion that the question demands an affirmative answer, then two further questions arise. (1) Are the activities of the institution such as come within its objects as defined by its charter, or do the respondents occupy their premises for the pursuit of activities not exclusively scientific; and (2) are the respondents supported wholly or in part by annual voluntary contributions?

According to paragraph 1 of the petition for a Royal Charter, the Institution of Mechanical Engineers was founded in the year 1847 as a voluntary association "having for its general objects "the promotion of the science and practice of mechanical "engineering." It was incorporated in 1878 under the Companies Acts as an association limited by guarantee, and was granted a Royal Charter on April 22, 1930.

Clause 7 of the charter reads as follows: [His Lordship read the clause and continued:] The appellants contend that the objects of the institution as defined by this clause are such that it cannot be said that it was formed for the purposes of science exclusively. The Lands Tribunal answered this first question in the affirmative. The president, after referring to the evidence of Professor Saunders said: "It is clear that the development of "mechanical engineering is a technical process. There must be "few people in this country better qualified than Professor "Saunders to explain in language the ordinary man can appre-"ciate what that process involves, and I accept his contention "that the promotion of the development of mechanical engineer-"ing means the increasing the scientific data so that you can do "things in mechanical engineering by the application of dis-"covered scientific principles rather than by intuition or guess. "This leads me to the conclusion that the object of clause 7 of the "charter is a purpose of science. I think that paragraphs (A), "(B), (C), (D) and (E) of the clause are ancillary to that "purpose in that they indicate the means by which the object "can be achieved, and on a true construction of the charter, I "hold that the institution is instituted for the purpose of science "exclusively."

The evidence of Professor Saunders, who is Dean of Engineering and head of the department of mechanical engineering at the Imperial College of Science at the University of London, was as follows: "I think mechanical engineering is an applied science "and as such it contains a true scientific element and an art "element. An engineer is obliged in the course of his work to "make many decisions and to do many things which are not "based on science alone; they are based on his experience, "accumulated knowledge from experience, and perhaps also "intuitive knowledge. The aim, however, of an engineer is to "get the best possible efficiency in what he does and to replace "the art element wherever possible by the scientific one. I "would have thought that it is impossible to separate completely "the two elements, that in any given problem both elements "must be present. But I would make strongly the point that "you cannot advance scientific engineering in a vacuum as a "science only. You can only advance it by doing things, by "building things, by studying the results, and in so doing "increasing the scientific content of your knowledge. So that, "listening to Mr. Rowe, I would have felt that it is quite "impossible to advance mechanical engineering science without "studying the practical matters, without in fact considering the "art content of the subject."

It is no doubt true to say that the term "mechanical engineer-"ing" connotes a true scientific element. It was not in dispute in any of the proceedings that there is a science of mechanical engineering, and that the promotion of the development of mechanical engineering must or at least should involve the development of that science. It may well be that the sum of scientific knowledge will be increased by practical experience in engineering construction. But that is not the same thing as saying that the promotion of the development of mechanical engineering means the pursuit of an exclusively scientific object. An institution may exist for a number of purposes. Although one or more of these may properly be described as scientific, the others may not be so, although the carrying out of them may add to the sum of scientific knowledge. During the argument we were referred to various dictionary definitions of the word "engineering." They did not seem to us to assist.

The term "mechanical engineering" is one in common use, and it appears to us that the way to approach the question is to consider whether in the ordinary usage of the term it can be said to refer exclusively to science. The sub-paragraphs to clause 7 of the charter do not appear to advance the matter. It is true that sub-paragraph (D) refers to the furtherance of education in "engineering science or practice," but otherwise they are consistent with either view of the meaning of the term "mechanical "engineering."

It was contended by the appellants that the term included not only the development of the technique and practice of engineering but the development of the engineering industry and various incidental matters such as works organisation and management. Unless we are constrained by authority to come to a different conclusion, we are of the opinion that on a proper construction of clause 7 of the charter the institution is not formed for the purpose of science exclusively. Without necessarily giving it the wide meaning for which the appellants contend, the term "mechanical engineering," in our judgment, includes something more than the science of mechanical engineering. At the least it includes the practice and technique of engineering.

It may be, as Professor Saunders has said, that science and practice are to some extent interdependent, that modern engineering technique is in part at least the outcome of scientific research and the application of known scientific principles, and that the practice of engineering may add to the sum of knowledge and experience from which further scientific principles may be discovered and applied. But that does not mean that the science and practice of engineering are the same thing, or that the purpose of their development can be said to be exclusively scientific any more than it can be said to be technical or practical. The two purposes may well run side by side, each to some extent the complement of the other, but in our view they remain nonetheless separate and distinct purposes.

It is helpful in coming to a conclusion on this part of the case to have regard to one or two passages in the speeches of the learned Law Lords in *Royal College of Surgeons of England* v. *National Provincial Bank Ltd.*[1] One of the questions for decision was whether the college was in law a charity, the relevant passage in the charter being "the due promotion and "encouragement of the study and practice of the said art and "science 'of surgery'." It was held that it was. Lord Normand said[2]: "The words 'the study and practice of the art and "'science' of surgery do not, in my opinion, mean 'the academic "'study and professional practice of the art and science of "'surgery'; they signify rather the acquisition of knowledge and "skill in surgery both by abstract study and by the exercise of "the art in the dissecting room and the anatomy theatre, and

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[1] [1952] A.C. 631; [1952] 1 T.L.R. 978; [1952] 1 All E.R. 984.

[2] [1952] A.C. 631, 641.

"they are capable of covering both the discovery of new knowledge, which is the fruit of research, and the learning of existing "knowledge either by students who are qualifying or by qualified "surgeons desirous of improving their knowledge and skill." Lord Morton said [3]: "This being so, I have no doubt that the "object of this newly created body, the college, is stated in the "last recital and is 'the due promotion and encouragement of "'the study and practice of the art and science of surgery.' As "I read the words 'study' and 'practice' they embody two "ideas, research in the laboratory and that practical experience "which can only be gained by using surgical instruments upon "human or other bodies. The object of the college is to promote "the art and science of surgery by encouraging each of these "activities." Lord Reid said [4]: "It is true that in *In re Royal* "*College of Surgeons of England* [5] the Court of Appeal took a "somewhat different view. There the case for the college was "that its property was legally appropriated and applied for the "promotion of science, and the court held, I think rightly, that "this was not the only purpose for which the property was held "and used. The promotion of science is one way of promoting "the study and practice of the art and science of surgery, but "it is not the only way"; and Lord Tucker said [6]: "In my view, "the objects of the college as set out in the charter of 1800, "and never thereafter varied, were (1) the promotion of the "science of surgery; (2) the promotion of education in surgery. "The latter can only be achieved by practice as well as study, "and the holding of examinations is an essential step in the "educational process." Their Lordships were not, of course, considering the effect of section 1 of the Scientific Societies Act, 1843, but it is interesting to note that they regarded the science and practice or art of surgery as separate objects.

In *Metropolitan Borough of Battersea* v. *British Iron and Steel Research Association* [7] Jenkins J. said: "(i) 'Science' for the "present purpose includes applied, as well as pure or speculative, "science (see *per* Lord Macnaghten in *Inland Revenue Commis-* "*sioners* v. *Forrest* (2) [8]) so that purposes directed to the pro- "motion of science in its application to a particular trade or "industry, such as the iron and steel trade or industry in the

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[3] [1952] A.C. 631, 654.
[4] Ibid. 661.
[5] [1899] 1 Q.B. 871.
[6] [1952] A.C. 631, 664.
[7] [1949] 1 K.B. 434; 65 T.L.R. 183.
[8] (1890) 15 App.Cas. 334.

"present case, may be regarded as purposes of science within "the meaning of the section.

"(ii) The question whether a particular society is 'instituted "'for purposes of science literature or the fine arts exclusively' "within the meaning of the section must be determined by "reference to the purposes of the society as defined by its con-"stitution, rather than the purposes it may actually have "pursued in practice," and he later said[9]: "On the question "of technical education we were referred to *Royal College of* "*Music* v. *Westminster Vestry*,[10] where it was held that the "teaching of music was a means of promoting the fine art of "music. But this proceeds on the ground that music is a fine "art, and only goes to show in the present case that the teaching "of science is a means of promoting science, not that technical "education is necessarily and exclusively scientific education, as "in my view it is not."

And in *British Launderers' Research Association* v. *Hendon Borough Rating Authority*,[11] a case which was considered at the same time as the *Battersea* case,[12] Denning L.J. said[13]: "The "purposes of science, however, do not include the purposes of the "firms or persons who make use of science. Many of our great "industrial concerns, such as I.C.I., make use of science and, "indeed, institute research laboratories for the purposes of "science, but only as incidental to their industrial purposes. So "also our technical schools make use of science and institute "laboratories for the purposes of science, but only as incidental "to the training of craftsmen. In such cases the laboratories are "instituted for the purposes of individuals, not for the purposes "of science except as incidental to the purposes of individuals."

In *Institute of Fuel* v. *Morley*[14] the House of Lords, reversing the decision of the Court of Appeal, came to the conclusion that the institute was formed exclusively for the purpose of science, and was, accordingly, exempt from rates. The purposes of the institute as set out in paragraph 7 of its charter were: "(a) To promote, foster, and develop the general advance-"ment of the various branches of fuel technology as an end in "itself, and as a means of furthering the more scientific and "economic utilisation of fuel of all kinds for industrial, com-"mercial, public, agricultural, domestic, transport and/or other

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[9] [1949] 1 K.B. 434, 456.

[10] [1898] 1 Q.B. 809 (C.A.)

[11] [1949] 1 K.B. 462; 65 T.L.R. 103; [1949] 1 All E.R. 21.

[12] [1949] 1 K.B. 462.

[13] [1949] 1 K.B. 434, 468.

[14] [1956] A.C. 245; [1956] 2 W.L.R. 64; [1955] 3 All E.R. 843.

"purposes, and to promote, assist, finance and support such in-"dustrial and scientific research, investigation, and experimental "work in the economical treatment and application of fuel as the "institute may consider likely to conduce to those ends, and to "the benefit of the community at large." It was held that the exclusive purpose of the society was scientific, and any advantages enjoyed by the members were ancillary to the advancement of fuel technology.

Lord Morton said [15]: "Mr. Lyell, for the respondents, sub-"mitted that the sub-paragraph stated two purposes, whereof "the first was scientific and the second was of a commercial "nature. I think it is quite possible to read (a) as stating two "purposes, one beginning with the words 'to promote, foster and "'develop,' and the other with the words 'to promote, assist, "'finance and support.'

"In my view, however, such a sub-division does not assist "the respondents, as each of the two purposes so stated is to my "mind a scientific purpose. I cannot find in either of them any "suggestion that the institute can embark on any commercial "pursuit; they are both confined to the acquisition of knowledge "in the realm of fuel technology, which is admittedly a science, "and to the spread of such knowledge for the benefit of the "community."

It was pointed out by Mr. Lyell in the argument in the present case that it was conceded from the outset that fuel technology was a science, and that the institute were occupying their premises for this purpose only. The substantial question at issue, therefore, was whether the other subjects were purposes which rendered the main purpose other than exclusive, or whether they were ancillary to that main purpose.

In *Society of Chemical Industry* v. *Cane*,[16] a case decided by the Court of Appeal, objects A and B of the preamble to the charter read as follows: "(A) To advance applied chemistry in "all its branches; (B) to afford the members thereof opportunities "for the interchange of ideas with respect to improvements in "the various chemical industries and for the discussion of all "matters bearing upon the practice of applied chemistry and the "publication of information thereon"; and clause 3 reads: "The "objects of the society shall be to carry on the work commenced "and heretofore generally carried on by the society of 1881 and

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[15] [1956] A.C. 245, 253.

[16] (1956) 54 L.G.R. 496; [1956] Ryde's Rat.Cas. 106.

"to promote the application of chemical science to arts and "manufactures and also the discussion and diffusion of all know-"ledge and information and to further by causing to be made or "assisting in the making of investigations inquiries and reports "upon novelties improvements inventions processes and the "practical application of scientific discoveries bearing upon the "practice of applied chemistry and of any of the industrial arts "thereto allied and to carry on the publication of the journal."

It was held that the society was exempt from rating. Parker L.J. said[17]: "The main argument before this court turned on "the construction of object B of the society as originally estab-"lished in 1881. Do the words of that object and, in particular, "the words 'with respect to improvements in the various "'chemical industries,' on their true construction, denote a "commercial purpose, not merely ancillary to the advancement "of applied chemistry, but a distinct, albeit subsidiary, purpose? "In deciding that question, I think it is important to bear two "things in mind. First, as the Act says, one has to see if the "society is 'instituted for the purposes of science exclusively.' "For that purpose, one looks at the objects clause, the objects "clause being the authorised activities of the society. The fact "that those authorised activities are labelled A, B, C, D, etc., "however many there may be, does not mean that they all con-"stitute separate purposes; albeit separately labelled, there may "be only one purpose in question. The second thing to bear in "mind is that the science we are dealing with here—it is admitted "it is a science—is applied chemistry, and applied chemistry "necessarily involves the promotion of chemistry applied to com-"mercial and industrial purposes. Accordingly, one would expect "to find references to industry, but it does not follow that one "of the objects is to promote industry, though no doubt dis-"semination of the knowledge acquired in the pursuit of applied "chemistry will necessarily promote industry." Again in this case it was common ground that applied chemistry was a science and its promotion was therefore a scientific object.

The institution, in argument on this part of the case, placed considerable reliance on the decision of this court in the case of *Institution of Civil Engineers* v. *Inland Revenue Commissioners*.[18] The question in that case was whether the Institution of Civil Engineers was "a body of persons . . . established for

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[17] 54 L.G.R. 496, 503.

[18] [1932] 1 K.B. 149; 47 T.L.R. 466.

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"charitable purposes only" and therefore exempt from income tax under section 37 (1) (*b*) of the Income Tax Act, 1918. It was held that they were so exempt. The society was incorporated by Royal Charter and the object for which it was founded was "the "general advancement of mechanical science, and more particu-"larly for promoting the acquisition of that species of knowledge "which constitutes the profession of a civil engineer, being the "art of directing the great sources of power in nature for the use "and convenience of man."

Lawrence L.J. in the opening sentence of his judgment said[19]: "The question in this case is whether the Institution of Civil "Engineers is a body of persons established for charitable "purposes only and therefore exempt from income tax under "section 37 (1) (*b*) of the Income Tax Act, 1918. The answer "to this question depends upon whether the institution is "established solely for the advancement of the science of civil "engineering (an admittedly charitable purpose), or whether one "of the purposes for which it is established is to benefit civil "engineers in order to enable them to practise their profession "to greater advantage," and later he said[20]: "Bearing in mind "that the original Charter of 1828 clearly states the only purpose "for which the institution was established, and that this purpose "has never been added to or varied by any of the supplemental "Charters, and further bearing in mind that the House of Lords "has decided that this purpose is for the general advancement "of the science of civil engineering, it follows in my judgment "that the institution is established for a charitable purpose only, "notwithstanding that it is of advantage to a civil engineer in "his profession to be a member of the institution, this result not "being a purpose for which the institution was established but "being incidental to and consequent upon the way in which "the institution carries out the charitable purpose for which "alone it was established."

Other authorities were cited by counsel for both parties in the course of this part of the argument, but they did not in our view give us any further assistance in coming to a decision. The effect of all the authorities would seem to be that each case must be considered according to the terms of its Charter, and it is to the true construction of these terms that regard must be had in determining whether the purposes of the institution are exclusively scientific. In considering the question regard must be had to the further question of whether purposes which do not appear to be scientific are merely ancillary purposes to the fulfilment of the exclusive object. That further question does not arise in the present case.

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[19] [1932] 1 K.B. 149, 167.

[20] Ibid. 171.

The object and purpose for which the institution was constituted is "to promote the development of mechanical engineering." We have already expressed our opinion that these words have a wider meaning than "to promote the development of "mechanical science" and there appears to be nothing in the authorities cited to us which leads us to a different opinion. We would, therefore, answer the first question by holding that the institution was not formed for the purpose of science exclusively.

In these circumstances it is unnecessary to consider separately whether the premises have been used by the institution for purposes other than those set out in the charter. There is, however, the further question upon which the institution's entitlement to exemption depends, that is to say, the question whether it is supported wholly or in part by annual voluntary contributions.

The income of the institution for the year ending December 31, 1955, was £168,482 2s. 11d. of which £138,750 2s. 6d. was derived from subscriptions, and the balance was made up chiefly of interest on capital, sale of "Proceedings," examination fees and rents. Out of these items it has been held by the Lands Tribunal that the subscriptions qualify as annual voluntary subscriptions, so that provided the institution were formed for scientific purposes, it would be exempt from rating. There is no doubt that the subscriptions are annual and that they support the institution in fact, indeed it depends for its support in the main upon these subscriptions, but the argument turned upon whether they are voluntary contributions. This matter was considered by the House of Lords in *Savoy Overseers* v. *Art Union of London*,[21] where it was decided that the Art Union of London, albeit a scientific society, was not "supported by voluntary "contributions" within the meaning of the Scientific Societies Act, 1843.

This decision therefore laid to rest a heresy which first appeared in *Birmingham Churchwardens* v. *Shaw*,[22] where Lord Denman had apparently treated the word "voluntary" as the antithesis to the word "compulsory."

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[21] [1896] A.C. 296; 12 T.L.R. 377.

[22] (1847) 10 Q.B. 868.

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It remains, therefore, to consider what is the true effect of the decision in the *Art Union* case, since it is argued on behalf of the institution that the *Art Union* case was determined against the union upon the sole ground that the members received full value for their money in return for their subscriptions. It is true that each member of the House emphasised this aspect of the case in his speech. We take as an illustration language used by Lord Macnaghten[23]: " It appears to me to be almost absurd to " say that a society is supported by voluntary contributions when " it prides itself, as the Art Union of London openly does, on " returning to every contributor the equivalent of his contribution " in respect to value and money's worth."

What then is the position where it can be fairly argued that the subscriber does not receive full value for his money and receives little by way of tangible benefits in return for his subscription? No clear answer has as yet been given by the courts to this question. We were told that in these cases what has been described as a " local rule " has been followed by the Lands Tribunal to the effect that subscriptions do not cease to be voluntary because the subscribers obtain the publications of the society at a reduced rate unless the value of the publications approximates closely to the amount of the subscriptions. In the case of the institution the cost to the members of the relevant publications, namely, " The Chartered Mechanical Engineer " and of the " Proceedings " which represented about 30 per cent. of the total of the annual subscriptions was held not to defeat the claim of the institution that the subscriptions were voluntary within the meaning of the Act. No other benefit was taken into account as consideration for the subscription sufficient to destroy the voluntary nature of the payment.

We do not find anything in the speeches of the House of Lords in the *Art Union*[24] case nor in subsequent authorities which supports the liberal interpretation of the word voluntary given by the tribunal in this and no doubt (as the president has indicated) in other cases.

Lord Herschell used these words[25]: " I do not think it was " intended to exempt from rating buildings belonging to a society " merely because the payments by which it was wholly or in " part supported were made voluntarily and not compulsorily, " when they were not made gratuitously, but were the price of

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[23] [1896] A.C. 296, 312.
[24] [1896] A.C. 296.
[25] Ibid. 310.

"the advantages obtained in return for them. The expression "'supported by voluntary contributions' has long been well "known in connection with hospitals and other institutions; I "think the essential idea conveyed by them is that the payments "are a gratuitous offering for the benefit of others, and not the "price of an advantage purchased by the contributor. It was "pointed out by Kay L.J. that in the case of some hospitals, the "contributors receive a number of letters of admission measured "by the amount of their subscriptions. But though this may "give them a voice as to the persons who are to be the objects of "the charity, I think it would be unreasonable to regard the "contribution as being on that account not a gratuitous charitable "gift, but the purchase of a personal advantage. If, indeed, a "hospital were established on co-operative principles, each "contributor being entitled to claim medical treatment there, "and the inmates being confined to contributors, I should say "that it was not supported by 'voluntary contribution,' even "when there was nothing to compel any person to become a "contributor, and he might cease to be so at any time he "pleased."

It will thus be apparent that the question does not depend on whether there is any consideration at all for a payment. A nominal consideration may be ignored, and this no doubt has led the tribunal to take a liberal view in some cases. We cannot, however, regard as nominal the contractual advantages which members of an institution such as this derive from their membership, and in our opinion the authorities are against such a contention. The object of the individual members in joining a society must, as Lord Macnaghten pointed out in the *Art Union* case,[26] be looked at separately from the purpose of the society itself.

It is true that the evidence accepted by the president was to the effect that the institution has not sought to promote the professional interests of its members, but it cannot be said that the subscriptions made to the institution are in their nature altruistic. If one concedes in this connection that the purpose of the institution is exclusively scientific, it does not follow that the motive which leads members to join it is that science may be advanced. One must still ask the question: "Are the members "acting from disinterested motives, and not looking for any "return in the shape of distinct personal advantage?"

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[26] [1896] A.C. 296, 313.

The question must be answered by looking at the nature of the society as revealed by its charter and by-laws, which regulate the election of members and the payment of subscriptions, and to the other activities of the society in which its members may take part.

It is legitimate to look at the petition upon which the charter was founded. Paragraph 7 reads: "The activities of the institution have for long been of great value to the profession. The researches directed, conducted, or assisted by the institution and the discussions thereon have dealt with every aspect of mechanical engineering and have contributed not a little to the development of that science. The opportunities afforded by the meetings of the institution for the interchange of ideas and experience have proved of great value to the members; the development of its own qualifying examinations and its co-operation with departments of Your Majesty's Government in technical education have raised the standard of technical knowledge throughout Your Majesty's Empire, while the election of suitable persons as graduates and students affords encouragement to those commencing their engineering career, and brings them in touch with senior members of their profession and with its current development."

The introduction to the annual report for the year 1953 contains these passages: "In introducing their report the council wish to draw attention to some of the more interesting events of a year notable for the fact that for the first time in the institution's history, the total membership exceeded 40,000. This fact bears witness to the increasingly influential part that the institution is playing in mechanical engineering, and to the esteem in which it is held in the profession. It is particularly gratifying to draw attention to the appeal which membership of the institution holds for the younger aspirants to professional status. The council continues to give careful thought to the finances of the institution and sought ways in which economies could be effected without impairing the value of services rendered to members; in this respect the detailed review of our publications carried out during the year has special importance."

Not only are members entitled to the publications referred to in the findings of the president, but also they obtain the other corporate benefits of a society composed of professional men interested in the same subjects and deriving advantages from their corporate studies. It should be remembered that the institution is to all intents and purposes wholly supported not by outside donors but by members who might be expected to join in order to enjoy the advantages which they can scarcely help obtaining from their membership. If motive in joining is (as we think it is) to be considered, it is impossible to ignore the fact that many of the activities of the institution will be inducements to join.

We give, as examples, some aspects of its educational work, its formation of an appointments bureau (although there was no evidence of its use), its provision of a model contract for use in projects involving mechanical engineering, the main object of which was found by the president to be to protect the material interests of the engineer in his professional capacity. These advantages are not in themselves negligible, though they may be less valuable than the more intangible general benefits of membership to which we have referred.

Support for the view which we have formed is to be found in the opinions of the House of Lords in the case of *Inland Revenue Commissioners* v. *Forrest*,[27] where the question was whether the property of the Institution of Civil Engineers was exempt from duty under the Customs and Inland Revenue Act, 1885, as being applied for the promotion of science. In speaking of that institution Lord Watson said[28]: "I do not doubt that membership is "accompanied by a certain amount of prestige which may prove "to be of service to a member in his professional career; but I "believe that the same result would attend membership of any "society which effectively promoted a branch of science intimately "connected with the profession or business in which the member "was engaged."

Lord Macnaghten said of that institution[29]: "Probably the "founders of that society were not insensible to the advantages "which such an institution was likely to confer upon its members "in their professional capacity. That would have been a formid- "able objection if the language of the Act of 1885 had been the "same as that of the Act of 1843." The dictum contained in the last sentence is directly in point in considering the position of the Institution of Mechanical Engineers.

In considering *Reg.* v. *Institution of Civil Engineers*[30] Lord Watson said[31]: "In order to bring a society within section 1 of

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[27] 15 App.Cas. 334; 6 T.L.R. 456.

[28] 15 App.Cas. 334, 351.

[29] Ibid. 354.

[30] (1879) 5 Q.B.D. 48.

[31] 15 App.Cas. 334, 348.

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"the Act of 1843 two statutory requisites must concur. The "society must be instituted exclusively for the purposes of "science, literature or the fine arts; and it must also be supported, in whole or in part, by annual voluntary contributions. "I do not think that the legislature intended that fixed yearly "payments which individuals agree to make in consideration of "their being admitted to a society and allowed to share in its "management (there being a legal obligation to make such payments so long as their membership continues), should be "regarded as voluntary contributions within the meaning of the "Act."

In *Institution of Civil Engineers* v. *Inland Revenue Commissioners* [32] Romer L.J. said: "Where a society is instituted for "a charitable purpose it is obvious that the membership of the "society may confer upon its holder personal advantages of "considerable value to him in his profession or in his social "standing." The Lord Justice then proceeded to give examples.

The judgment of their Lordships in the *Forrest* case [33] was held virtually to have overruled the decision of the Divisional Court in *Reg.* v. *Institution of Civil Engineers*.[34] Romer L.J. said [35]: "As regards that judgment"—that is, the decision of the Divisional Court—"Lord Macnaghten while agreeing in the conclusion said that he had some difficulty in accepting the "propositions and following the reasoning on which the conclusion "was based. The conclusion was that the institution was not "entitled to exemption under the Act of 1843; and I think that "Lord Macnaghten meant no more than that the conclusion could "be supported on the ground that the institution was not "supported in whole or in part by 'voluntary' contributions."

The observations which have been cited from the cases which have been before the courts involving the Institution of Civil Engineers are, we think, of persuasive authority in support of the view which we have formed, that the only inference which can be drawn from the documents and from the findings of fact of the president is that the subscriptions of members of the Institution of Mechanical Engineers cannot be regarded as voluntary within the meaning of that word in the Act of 1843.

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[32] [1932] 1 K.B. 149, 172; 47 T.L.R. 466.

[33] 15 App.Cas. 334.

[34] 5 Q.B.D. 48.

[35] [1932] 1 K.B. 149, 177.

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We would answer this further question by holding that the institution is not supported wholly or in part by annual voluntary contributions. On these two grounds, therefore, the appeals will be allowed.

Appeals allowed.
Respondents to pay to valuation officer and Westminster City Council half the costs of the appeal.
Leave to appeal.

Solicitors: *Solicitor of Inland Revenue; Allen & Son; Bristows, Cooke & Carpmael.*

F. R. D.

REGINA *v.* McKENNA.

REGINA *v.* McKENNA.

REGINA *v.* BUSBY.

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Jan. 12, 15.

Cassels, Donovan and Ashworth JJ.

Jury—Coercion—Judge, by—Criminal law—Threat to keep jury all night if no verdict within ten minutes—Effect.
Criminal Law—Accessory after the fact—Accessory to accessory—Charge of assisting principal felon—Assistance to accessory to principal felon —Whether indirect assistance to principal.
Criminal Law—Court of Criminal Appeal—Proviso to section 4 (1)—*Coercion of jury—Whether proviso applicable—Criminal Appeal Act,* 1907 (7 *Edw.* 7, *c.* 23), *s.* 4 (1), *proviso.*
Criminal Law—Venire de novo—Coercion of jury—Whether trial nullity.

It is a cardinal principle of criminal law that, in considering their verdict, a jury should deliberate in complete freedom, uninfluenced by any promise and unintimidated by any threat; for they stand between the subject and the Crown and are one of the defences of personal liberty.

At the trial of three defendants, one of whom was charged with larceny, and the other two as accessories after the fact, the judge, after the jury had been considering their verdict for some two hours, ordered that they be brought back into court and said to them: "In ten minutes I shall leave this building and if, by that time, "you have not arrived at a conclusion in this case you will have "to be kept all night and we will resume this matter at quarter to "twelve tomorrow." The jury retired again and six minutes later brought in verdicts of Guilty. The evidence against all the defendants was cogent. On appeal, in which the prosecution, inter alia, invited the court to apply the proviso to section 4 (1) of the Criminal Appeal Act, 1907 [1]:—

Held, that the convictions must be quashed. It was of fundamental importance that in their deliberations a jury should be free to take such time as they felt they needed (subject to the right of the judge to discharge them if protracted consideration still produced disagreement) and, although the evidence was such that any jury would have been amply justified in finding the defendants guilty, it would not be right to apply the proviso to section 4 (1); the principle at stake was of more importance than the case itself.

Held, further, that the trial was not a nullity in the true sense of the word, and that, therefore, the court could not, as an alternative, order a venire de novo.

A person who, knowing of a felony, assists not the principal felon but an accessory after the fact, may indirectly assist the principal felon and can thereby be guilty of himself being an accessory after the fact in respect of the same felony.

APPEALS against conviction.

The appellants, Arthur William Busby, Charles Alexander McKenna and William James McKenna, were convicted at Nottingham Assizes before Stable J. on counts in an indictment charging Busby with the larceny of a number of television and radio sets and other electrical equipment from a motor-van, and of taking and driving away the van without the owner's consent in the county of Nottingham, and Charles and William McKenna with being accessories after the fact in that they knowingly received, comforted, harboured, assisted and maintained Busby and three other named persons.

The trial began on Monday, November 23, 1959, and at the outset the jury were informed that the court could not sit on the Wednesday afternoon, but would rise at one p.m. The court sat late on the Monday and Tuesday, and on the morning of Wednesday, November 25, the judge began his summing-up. At about mid-day he explained to the jury the procedural rules, telling them that once they had retired they could not separate until a verdict had been arrived at, and said that he had to go to London by a certain train, which would mean that he would have to leave the court at about one p.m., and that if they felt that they could not arrive at a verdict before then, he could break off his summing-up and conclude it when he returned at 11.45 on the following morning. After discussion, the foreman of the jury informed the judge that they would require more than three-quarters of an hour to reach a verdict, whereupon the judge, having said that he would catch a later train, finished his summing-up. The jury retired at 12.20 p.m. At 2.20 they returned, asking the judge two questions: first, whether it was possible for William James McKenna to be an accessory after the fact by wittingly helping an accessory after the fact, to which the judge replied: "Yes"; and, secondly, whether, if they were convinced by the evidence that Busby was driving the van in the county of Cambridge, in what way could the indictment be altered, as to which the judge said that it could not be altered at all and that it charged two offences, one, taking an active part in stealing and taking the contents of the van, and the other, driving the van without the lawful authority or permission or knowledge of the owner.

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[1] Criminal Appeal Act, 1907, s. 4 (1): "The Court of Criminal Appeal " . . . shall allow the appeal if they " think that . . . the judgment of the " court before whom the appellant was " convicted should be set aside on " the ground of a wrong decision of " any question of law or that on any ' ground there was a miscarriage of " justice, . . . Provided that the court " may, notwithstanding that they are " of opinion that the point raised in " the appeal might be decided in " favour of the appellant, dismiss the " appeal if they consider that no sub" stantial miscarriage of justice has " actually occurred."

The jury retired at 2.23 and returned to the court at 2.38, when the judge said: "I have disorganised my travel arrangements out of consideration for you pretty considerably already. "I am not going to disorganise them any further. In ten minutes "I shall leave this building and if, by that time, you have not "arrived at a conclusion in this case you will have to be kept all "night and we will resume this matter at quarter to twelve "tomorrow. . . ." The jury retired again at 2.39 and at 2.45 returned, bringing in verdicts of Guilty.

All three appellants appealed on the ground that there was a substantial miscarriage of justice in that, contrary to the principles of the common law, the judge set a time limit within which the jury should return their verdict, threatening that otherwise they could not separate until the resumption of the court on the following morning. William McKenna also appealed on the ground of misdirection in that the judge told the jury that he could be an accessory after the fact to Charles McKenna if they convicted Charles McKenna of being an accessory after the fact to the principal felon, and that he could be an accessory after the fact to Busby even if he did not in fact receive, relieve, comfort or assist Busby.

The facts are more fully stated in the judgment.

J. J. Deave for the appellants William and Charles McKenna. It is a basic principle of the common law that a jury should return a free verdict and should receive no assistance and be under no threat of a fine or imprisonment. During the sixteenth and seventeenth centuries, and before that time especially when they were witnesses to the actual event, it was the common practice to imprison juries who failed to agree until such time as they did; juries have also been imprisoned or fined if their decision was contrary to the directions of the judge. But those practices ceased with *Rex* v. *Bushell*.[2] Today, the function of a jury is to determine right and wrong between an accused person and his country, and, since the time juries ceased to be witness of fact, there has been a requirement that there should be a free jury: it is a basic principle arising from common usage that they should be permitted to discuss and return their verdict without threat of imprisonment or fines.

The words used by the judge to this jury amounted to a threat. A transcript cannot tell of the atmosphere of the court, or of the inflexion and fervour with which words are uttered, but it is submitted that the words complained of here were uttered in such a way as to leave the jury in no doubt that if they did not reach a decision in ten minutes they would suffer imprisonment until the judge returned on the following morning, and that they may well have been shocked into returning a prompt verdict. In *Rex* v. *Hartleigh*,[3] which appears to be the only modern authority on this matter, the chairman told the jury that they would be locked up for two hours, and this court held that the jury had not been coerced into agreeing, but that the procedure was regular and there was no reason to interfere. But that case should be distinguished: here the jury had already been out for two hours, and there is a great difference between being threatened with being locked up for two hours and being imprisoned for the whole night.

[ASHWORTH J. Would the mere fact that a judge told a jury that they would have to stay all night be objectionable?]

Not necessarily, but it is submitted that the better course would be to ask them whether they could not agree, to give them more time, and to say that, if they did not agree within an hour or so, they could disagree and be discharged. Here the judge tried to shock the jury into reaching a verdict so that he could catch his train.

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[2] (1670) 6 State Trials 999.

[3] (1908) 1 Cr.App.R. 17.

As to William McKenna's other ground of appeal, he was charged with having received, comforted, harboured, assisted and maintained Busby and the other persons named, but there was no evidence that he assisted anyone other than his brother Charles. He could not, therefore, be guilty of being an accessory after the fact to Busby.

[Donovan J. But in assisting his brother, he might have assisted Busby.]

There was no evidence that he did assist Busby, either directly or indirectly. The inference from the question asked by the jury is that they had come to the conclusion that he had not assisted Busby at all and that their minds were concentrated on the assistance he had given to his brother.

[Cassels J. If we are with you on the first point, what do you suggest that we should do?]

It is submitted that the court should allow the appeal and quash the convictions. The words used by the judge constituted such a threat, and were such a breach of the principles of the common law as to go to the root of the matter, and, therefore, it is not a case in which the court should apply the proviso to section 4 (1) of the Criminal Appeal Act, 1907. Justice must not only be done, but must be seen to be done, and this interference with the jury's freedom to consider their verdict is so serious that the only appropriate course is to quash the convictions.

Even if this were an extreme case, and the evidence against the appellants had been overwhelming, the fact that the jury were out so long without making up their minds shows that it was not so overwhelming to them as it might seem to be to a lawyer. No matter what the strength of the case against the appellants, the jury obviously felt difficulty, so that no distinction can be drawn between the cases of any of the appellants. This is too fundamental to be allowed to pass.

P. G. Hughes for the appellant Busby. The argument for the appellants William and Charles McKenna that it is a fundamental principle of our criminal law that a jury should reach their verdict free from threat or favour or promise is adopted. At its lowest, there must be a strong suspicion that this jury acted as they did because of the way in which they were treated by the judge. The second question put by them relating to Busby indicates that, shortly before the judge's ultimatum, they were in some doubt as to the part played by Busby. The manner in which the judge dealt with that question, without any real appreciation of the jury's difficulty, indicates the general atmosphere of haste. It is an almost irresistible inference from the fact that the jury, after being unable to make up their minds in two and a quarter hours, did so in six minutes after the judge's threat, that the consideration uppermost in their minds during those six minutes was not the evidence but the consequences to themselves should they fail to agree quickly. *Rex* v. *Hartleigh* [4] should be distinguished. There is a great difference between a case where a jury retires late in the evening and has to stay all night and this case, in which, after deliberating for over two hours, the jury were told that, if they did not reach a decision in ten minutes, they would be kept for another twenty-one hours. Moreover, it should not be overlooked that there were two women on the jury who might have reacted more strongly than the men.

T. R. Fitzwalter Butler and *D. M. Cowley* for the Crown. This alleged irregularity should be considered in three stages: first, whether or not the words used by the judge did in fact amount to an irregularity at all; secondly, if the court is disposed to consider that there was some irregularity, whether it affected the trial of all, or one or more than one of the defendants; and, thirdly, if so, what course the court should adopt.

As to the first stage; *Rex* v. *Hartleigh* [4] is the only authority throwing any light on this matter, but little reliance is placed on that decision, because the report is scanty and it is difficult to see what in fact did happen. In considering the effect of the words used by the judge, the court should have regard to the whole of the proceedings. Before there was any suggestion of a threat or pressure, the judge clearly explained to the jury the procedural difficulties which might arise if they had not reached agreement by one o'clock. It is surprising that the foreman of the jury, when he said that they would require more than three-quarters of an hour, did not add that, in the circumstances, they would prefer to break off then and continue on the following day. Had he done so, the judge would not have continued his summing-up.

[DONOVAN J. It is surprising that the judge proceeded. The foreman of a jury is sometimes nervous, and the responsibility cannot be put upon the jury.]

The judge did say that he would catch a later train. But when the words were uttered the jury were not taken by surprise; they knew what the position was. Had the words come suddenly out of the blue, there would have been far more of a threat or duress than there in fact was in the circumstances. It is not sought to justify the actual words used, and it must be conceded that they were unfortunate, but even if the judge was a little impetuous in the language he used, and the words did constitute pressure on the jury, that was not necessarily disadvantageous to the defendants. It was just as likely to cause the jury to acquit as to convict.

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[4] 1 Cr.App.R. 17.

If pressure was put upon the jury, then it is submitted that it can only have affected the case of William McKenna, for the case against the other two defendants was quite clear. It is difficult to see what the defence of Charles McKenna was, except that he was acting under some kind of duress, and, if that could be a defence to the charge in law, it was quite inconsistent with the evidence. The jury can have been in no doubt as to his guilt, and that that is so is borne out by inference from the fact that neither of the two questions they asked concerned him. They had been deliberating for a long time and had any matter been troubling them they would have raised it then. The judge dealt with Busby's case very fully in his summing-up; Busby's conduct and the statements he made to the police officers were wholly inconsistent with his defence. It is submitted that the evidence against both Busby and Charles McKenna was so overwhelming that no reasonable jury could have come to any conclusion other than that they were guilty. If the court does come to the conclusion that there was some irregularity in the trial, it is asked to consider the propriety of applying the proviso to section 4 (1) of the Act of 1907 in the cases of these two appellants, but it is not asked to do so in the case of William McKenna.

[DONOVAN J. How can that concession be made in William's case only? The evidence against him was clear and cogent also.]

In his case the jury appear to have felt some difficulty in making up their minds, and his story, on his own evidence, might have raised some doubt.

[DONOVAN J. But the prosecution brought evidence that his story was untrue.]

It is not that the case against William was not strong; it is only that it was not as strong as that against the other two defendants, who were directly implicated on their own evidence. But, on reconsideration, the court is asked to consider applying the proviso in the case of William too.

If there was an irregularity vitiating the trial of all three appellants, the court is not obliged to quash the conviction but has power to make an order in the nature of a venire de novo: *Crane* v. *Director of Public Prosecutions*.[5] The essence of a verdict is that it should be free, and if there was some pressure or threat so that the verdict was not free, it was not a true verdict, and there was, therefore, more than a mere irregularity. *Rex* v. *Neal*[6] should be distinguished: there was there a mere procedural irregularity and the verdict was a perfect verdict. The tests there laid down were not intended to be exclusive, and it was said[7] that, if there had been a mistrial, the circumstances being such as to render the trial a nullity from the outset, the court could order the case to be retried. If the argument for the appellants be right, and this jury was subjected to pressure, it was not a competent jury, and the court can order a venire de novo.

[DONOVAN J. referred to *Reg.* v. *Camborne Justices, Ex parte Pearce*.[8]]

Reliance is placed on the passage in the judgment of the court in that case where it was said[9] that the continued citation of the maxim that justice must not only be done but must be seen to be done in cases to which it was not applicable might lead to the erroneous impression that it was more important that justice should appear to be done than that it should in fact be done.

Counsel were required to reply only in regard to the application of the proviso.

Deave in reply. The threat to the jury affects their verdict as a whole and no distinction can be made between the cases of any of the defendants at the time when it was made. [Reference was made to *Reg.* v. *Camborne Justices, Ex parte Pearce*.[10]] This is a matter going to the root of the basic principles of our system of criminal law, and if there was pressure on the jury of a type that in the circumstances was wrong, that in itself is a substantial miscarriage of justice and, therefore, the proviso should not be applied.

Hughes, in reply, adopted the argument for the other two appellants.

Cur. adv. vult.

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[5] [1921] 2 A.C. 299; 37 T.L.R. 788.

[6] [1949] 2 K.B. 590; 65 T.L.R. 557; [1949] 2 All E.R. 438; 33 Cr. App.R. 189.

[7] [1949] 2 K.B. 590, 597.

[8] [1955] 1 Q.B. 41; [1954] 3 W.L.R. 415; [1954] 2 All E.R. 850.

[9] [1955] 1 Q.B. 41, 52.

[10] [1955] 1 Q.B. 41.

January 15. CASSELS J. read the following judgment of the court:

These three appellants were convicted at Nottinghamshire Assizes on November 25 last before Stable J. of the following offences: Busby of stealing 162 television sets, 120 pocket radio sets, 6 automatic record players, and other valuable electrical equipment from a Dennis motor-van in the County of Nottingham in May last; and also of taking and driving away the same van without the owner's consent: Charles and William McKenna of being accessories after the fact in respect of the same theft.

Busby, a man with a criminal record, was sentenced to three years' imprisonment for the theft, and to six months for taking and driving away the van, these sentences to run concurrently. Charles McKenna, who had a previous conviction in October, 1959, of being an accessory after the fact in respect of the theft of certain other television sets, for which he received a term of 18 months' imprisonment, was now sentenced to two years' imprisonment, the sentence to run as from Commission Day of the Assizes. William McKenna, who had only one minor previous conviction, was put on probation for three years.

All three now appeal to this court, Busby and Charles McKenna by leave of the court, and William McKenna with the certificate of the judge on a point of law peculiar to his case alone. This was whether a person who, knowing of the felony, assisted not the principal felon, but an accessory after the fact, could thereby be guilty of himself being an accessory after the fact in respect of the same felony. The judge ruled that he could, and we agree. Indeed, as a proposition of law this ruling was not seriously disputed before us. The argument addressed to us was that since William McKenna was charged in terms with assisting the principal felon, it would not be enough to justify a conviction that he should be found guilty of assisting an accessory only. But the jury by their verdict found William McKenna guilty of assisting the principal felons. He could do this indirectly by assisting an accessory after the fact to the same felony, and there was cogent evidence that he did so. If, therefore, there were no other ground of appeal in William McKenna's case, there would be no reason for interfering with the verdict.

There is, however, a further ground of appeal common to all three appellants. In the case of Busby and Charles McKenna it is their only ground. It is this: that the judge, after the jury had been considering their verdict for over two hours, called them back into court and threatened to keep them together all night and until 11.45 a.m. the next day unless they arrived at a conclusion within the next ten minutes.

The judge's actual words, according to the transcript of the proceedings, were these: "I have disorganised my travel "arrangements out of consideration for you pretty considerably "already. I am not going to disorganise them any further. In "ten minutes I shall leave this building and if, by that time, "you have not arrived at a conclusion in this case you will have "to be kept all night and we will resume this matter at quarter "to twelve tomorrow. I do not know, and I am not entitled "to ask—and I shall not ask—why in a case which does not "involve any study of figures or documents you should require "all this time to talk about the matter. May I suggest to you "that you go back to your room, that you use your common "sense, and do not worry yourselves with legal quibbles. That is "what you are brought here for: to use your common sense, "bring a bit in from outside. There it is, members of the "jury." The jury thereupon retired again and came back into court six minutes later with verdicts of guilty on the charges above set out. It is now said on behalf of all three appellants that the ultimatum delivered by the judge was so improper that the convictions should be quashed.

In fairness to the judge the following facts should be mentioned: The trial began on Monday, November 23, and at the outset the jury were informed that the court could not sit on the Wednesday afternoon, but would rise at 1 p.m. The court sat until 5 p.m. on the Monday, and until 6.30 p.m. on the Tuesday. On Wednesday morning the judge commenced his summing-up, and at 12 noon he addressed the jury as follows: "Under the rules that govern our procedure, once a summing-up "is finished and the jury retire they cannot separate until the "verdict has been arrived at. If in the middle of a summing-up "a break is requested, the jury can go before the conclusion, and "come back and hear the conclusion of the summing-up the "next day or after the adjournment. The position is this, that "I am very much afraid that I have this engagement and I "cannot escape it. I have to get up to London by the 1.35 "train, which means I shall have to leave here about 10 past 1. "If you feel you cannot arrive at a verdict in this case before "then I can break off my summing-up at this stage. There "won't be very much to add, I can assure you, and you can "come back here tomorrow morning at 11.45 a.m., by which

" time I shall have returned from London, and then I can " conclude the summing-up and you can retire and arrive at " your verdict. What I want to guard against is 1 o'clock " coming and you saying, ' We still have not arrived at our " ' verdict,' in which case I would have to throw this engagement over and it would be very inconvenient and would keep " you all locked up overnight." (The foreman of the jury:) " May " we discuss that, my Lord? " (Stable J.:) " I won't finish my " summing-up; we will have a little break."

The court thereupon adjourned for ten minutes, and upon the resumption at 12.15 p.m. the foreman of the jury informed the judge that the jury would require more than three-quarters of an hour to reach a verdict. This, of course, would mean that if the judge went on to conclude his summing-up, the court could not rise at 1 p.m. as had been arranged. Instead of accepting this position, and concluding his summing-up the next morning, the judge said: " I will catch the later train and I will " now run through the indictment again." Having done this, and finished his summing-up, the judge asked the jury to consider their verdict at 12.20 p.m. They thereupon retired, and were out for two hours. At 2.20 p.m. they returned, asking for guidance upon two questions, and this the judge gave. One question was whether by wittingly helping an accessory after the fact William McKenna could himself be an accessory after the fact, and the judge, as we have already stated, said: " Yes." The other was a question which seemed to indicate that the jury might be convinced that Busby took and drove away the Dennis van in Cambridgeshire but not in Nottinghamshire, as the count in the indictment alleged. They wanted to know if in these circumstances the indictment could be altered. If we may respectfully say so, the judge did not seem fully to grasp the point the jury were making. Otherwise he could have told them that they could say, if they so found, that Busby was guilty of taking and driving the van away in Cambridgeshire. Nothing, however, now turns upon this particular point and the answer which the judge in fact gave, except that the prosecution, very naturally, stresses the fact that the jury's question showed that they thought that Busby was guilty of this offence at any rate in the County of Cambridge.

Having received answers to their two questions the jury retired again at 2.23 p.m. Fifteen minutes later they were apparently brought back into court by order of the judge, and he then delivered to them what has been called the ultimatum to reach a conclusion within the next ten minutes or be kept together all night. We think we ought to state that a jury is, in any event, never locked up in the jury room all night, but if necessary accommodated in an hotel. This jury may, very understandably, not have known this. After the threat (and we regret we can call it nothing else) that failing a conclusion in ten minutes they would be kept together till 11.45 the next morning, the jury arrived at a conclusion adverse to the appellants in six minutes.

It is a cardinal principle of our criminal law that in considering their verdict, concerning, as it does, the liberty of the subject, a jury shall deliberate in complete freedom, uninfluenced by any promise, unintimidated by any threat. They still stand between the Crown and the subject, and they are still one of the main defences of personal liberty. To say to such a tribunal in the course of its deliberations that it must reach a conclusion within ten minutes or else undergo hours of personal inconvenience and discomfort, is a disservice to the cause of justice. In this case the ultimatum no doubt fell with added force upon the jury since two of them were women. It may well be that having regard to the steps he had taken from the outset to ensure that the case should finish by mid-day on the third day, steps which included working beyond the normal hours on the Monday and the Tuesday, the judge was understandably irritated by the inconvenient slowness of the jury in reaching a verdict in what he thought was a plain straightforward case. But juries do at times take much longer than a judge may think necessary to arrive at a verdict; there are, after all, twelve of them who have to be unanimous, and the proper exercise of the judicial office requires that irritation on these occasions must be suppressed or, at any rate, kept severely in check. To experience it is understandable; to express it in the form of such a threat to the jury as was uttered here is insupportable.

What then, in these circumstances, should this court do? The prosecution asked originally that a distinction should be drawn between the cases of Busby and Charles McKenna on the one hand, and William McKenna on the other; and that if the judge's ultimatum to the jury were a grievous irregularity, William McKenna's conviction should be quashed, but the other convictions should stand. This was because, in the prosecution's view, the case against Busby and Charles McKenna was overwhelming, but not nearly so strong against William McKenna. Pressed by the court with the strength of the evidence against William McKenna the prosecution finally submitted that his conviction, too, ought in any event to be sustained. In other words, in the case of all three appellants the proviso to section 4 (1) of the Criminal Appeal Act, 1907, should be applied.

We subscribe to the view that the evidence against all three appellants was cogent to a degree. We also agree that it is possible that the jury had little doubt about the guilt, at any rate, of Busby and Charles McKenna. The difficulty, however, is that the opposite view cannot, with complete confidence, be excluded. They had put forward defences which though they may appear to a lawyer to be fanciful, at any rate had the effect that after two hours the jury still had not arrived at a unanimous verdict. At no stage did they say, as they could have done, that they were agreed in the case of some of the prisoners but still not agreed as regards another. And when they were told to reach a conclusion as regards all three prisoners within the next ten minutes or, in default, to remain together all night, it is, at the very least, a reasonable inference that what their minds concentrated upon in these last six minutes was not so much the evidence they had to consider, but the inconvenience and discomfort with which they had been threatened. This being so, the court does not think it right to resort to the proviso to section 4 (1). The prosecution also submits, as an alternative, that a venire de novo should be ordered, but this trial was not in the true sense of the word a nullity.

With regret, therefore, the court feels bound to quash these convictions. Although any jury would have been amply justified in finding all these appellants guilty of what was, by whomsoever committed, an extremely serious, well-planned crime, it is of fundamental importance that in their deliberations a jury should be free to take such time as they feel they need, subject always, of course, to the right of a judge to discharge them if protracted consideration still produces disagreement. Plain though many juries may have thought this case, the principle at stake is more important than the case itself.

The appeals are accordingly allowed and the convictions quashed.

In the case of Charles McKenna this will not mean his discharge. He is still serving his sentence of 18 months' imprisonment on another case. In the case of Busby it does mean that he is discharged.

Appeals allowed.

Solicitors: *Registrar, Court of Criminal Appeal; R. A. Young & Pearce, Nottingham.*

J. F. L.

1959
April 14.

Lord Parker C.J., Donovan and Salmon JJ.

CATER *v.* ESSEX COUNTY COUNCIL.

Town and Country Planning—Enforcement notice—Form—Validity—Notice reciting development without permission—Whether permission under Order of 1950, *permission under Part III of Act of* 1947*—Whether enforcement notice valid—Town and Country Planning General Development Order,* 1950 (*S.I.* 1950, *No.* 728), *art.* 3 (1), *Sch. I, Class IV,* 2*—Town and Country Planning Act,* 1947 (10 *&* 11 *Geo.* 6, *c.* 51), *ss.* 12, 13 (1), 23 (1).

The appellant was the owner of land which, prior to 1954, was used as a smallholding. In 1954 he allowed caravans to park on the land. Planning permission for a caravan site having been refused and an appeal to the Minister dismissed, the local planning authority on December 12, 1956, served an enforcement notice on the appellant which recited that "whereas . . . development consisting "of a material change of use has been carried out . . . without "the grant of permission required in that behalf under Part III "of [the Town and Country Planning Act, 1947], the said land "being used for the purpose of a caravan site," and required the appellant within three months "to discontinue the use of the said "land comprising the said development and to restore the said land "to its condition before the development took place." The number of caravans on the land was not reduced and finally the local planning authority charged the appellant with using the land for the purpose of a caravan site in contravention of an enforcement notice which required such use to be discontinued. The justices found the offence proved. On appeal:—

Held, that in a case where the Town and Country Planning General Development Order, 1950, applied by the First Schedule, Class IV, 2, to permit "the use of land . . . for any purpose on not "more than 28 days in total in any calendar year," there had been a grant of permission required in that behalf under Part III of the Act of 1947, within section 23 (1) of the Act; that, accordingly, in the present case, the recital in the enforcement notice that development of the land as a caravan site had been carried out without the grant of permission was not true in fact; and that, therefore, the notice was a nullity.

Francis v. *Yiewsley and West Drayton Urban District Council* [1958] 1 Q.B. 478; [1957] 3 W.L.R. 919; [1957] 3 All E.R. 529 applied.

Case stated by Essex Justices sitting at Romford.

The appellant, John Cater, was charged on an information dated May 1, 1958, and preferred by the Essex County Council, that on April 14, 1958, at Romford without the grant of permission in that behalf under Part III of the Town and Country Planning Act, 1947,[1] he used certain land at Cummings Hall Farm, Bear Lane, Romford, for the purpose of a caravan site in contravention of an enforcement notice dated December 12, 1956, which required such use to be discontinued, contrary to section 24 of the Act of 1947.

The following facts were admitted or proved before the justices. An enforcement notice dated December 12, 1956, and addressed to the appellant, was served on the appellant on December 13, and read as follows: "Whereas the County Council of Essex (hereinafter referred to as 'the county council') are the local planning authority under the Town and Country Planning Act, 1947 (hereinafter referred to as 'the Act') for the administrative county of Essex. And whereas it appears to the county council that development consisting of a material change of use has been carried out on the land described in the schedule hereto without the grant of permission required in that behalf under Part III of the Act, the said land being used for the purpose of a caravan site. And whereas you are the owner and occupier of the said land take notice therefore: (1) That you are hereby required within three calendar months from the date on which this notice takes effect to discontinue the use of the said land comprising the said development and to restore the said land to its condition before the said development took place such restoration to be carried out to the

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[1] Town and Country Planning Act, 1947, s. 23 (1): "If it appears to the local planning authority that any development of land has been carried out after the appointed day without the grant of permission required in that behalf under this Part of this Act, . . . the local planning authority may within four years of such development being carried out, . . . serve on the owner and occupier of the land a notice under this section."

"satisfaction of the county planning adviser. (2) That if after "the period specified in (1) above you use the said land or cause "or permit the said land to be used for the purpose specified "above without the grant of permission in that behalf under "Part III of the Act you will be guilty of an offence and liable "on summary conviction to a fine not exceeding £50; and if you "continue such use or cause or permit such use to be continued "after the conviction you will be guilty of a further offence and "liable on summary conviction to a fine not exceeding £20 for "every day on which the said use is so continued. This notice "shall take effect at the expiration of a period of 28 days after "the service thereof upon you, subject to the provisions of "subsections (3) and (4) of section 23 of the Act. . . ." The schedule specified the land situate at Cummings Hall Farm. The land to which the enforcement notice related was about 6·7 acres in extent and the appellant was at all material times the owner of the land and the person responsible for its use. The land was formerly used as a smallholding without success and in 1954 it began to be used for parking caravans. The number on the land increased to about 90 caravans and on January 21, 1955, planning permission for use as a caravan site was refused by the county council. In May, 1956, a local inquiry was held by an inspector appointed by the Minister of Housing and Local Government on the appellant's appeal against the refusal. By a letter dated July 19, 1956, the Minister dismissed the appeal but stated that he had much sympathy with the caravan occupiers and he relied on the county council to give full weight to the need to avoid hardship in pursuing any enforcement action. The Romford Borough Council supported the appellant at the local inquiry. The land was surrounded by trees and screened from view. There were good facilities provided and the site was accepted as a well-run caravan site by one of the planning assistants who gave evidence for the county council. Between 200 and 250 persons lived in the caravans and the planning assistant stated that he knew of no other accommodation available for them in the area nor of any other place to which the caravans could be moved. By a letter dated December 12, 1956, the county council informed the appellant that provided he took steps to have the caravans removed progressively over the next three years, to the county council's satisfaction, they would not prosecute him for failure to comply with the notice within the time specified therein. On March 11, 1958, the clerk to the county council wrote to the appellant stating that he had failed to reduce the caravans to any extent, and had admitted additional caravans to the site, and that if the number of caravans on the site exceeded 56 by April 14, 1958, the appellant would have failed to comply with the terms of the council's offer and their instruction to prosecute would be carried out. There were at the date of service of the enforcement notice approximately 100 caravans on the land and that number, with small fluctuations, remained up to the time of the hearing of the information.

It was contended by the appellant that the facts alleged and proved did not amount to a breach of the enforcement notice; that the prosecution was out of time; that the enforcement notice was bad in that it did not comply with section 23 of the Town and Country Planning Act, 1947. The notice failed to specify the development as required by that section; it made no allegation of the manner in which the use of the land was said to have been changed; and it made no allegation of the date on which any such change occurred; that the enforcement notice was bad in that it alleged that development consisting of a material change of use had been carried out without the grant of the requisite permission, whereas in fact permission for the alleged change of use was granted by the Town and Country Planning General Development Order, 1950,[2] article 3 and the First Schedule, Class IV, 2.

The magistrates did not require the county council to argue on any of those submissions and were of opinion that the enforcement notice was valid, that the facts proved amounted to a breach of the notice and that the prosecution was in time. They fined the appellant £20.

The appellant appealed.

R. E. Megarry Q.C. and *R. Higgins* for the appellant. This case concerns the validity of an enforcement notice and requires a decision on the point which the court left open in *Francis* v. *Yiewsley and West Drayton Urban District Council*,[3] namely, whether or not permission for user for 28 days under the Town and Country Planning General Development Order, 1950, was permission under the Town and Country Planning Act, 1947. In *Francis'* case the court did not have to decide that point, because there had been a retrospective planning permission granted by the Minister for six months. In the present case there was no express grant of planning permission to the appellant, and therefore this court will have to decide whether the 28 days' permission was planning permission under the Act, for, if it was, then the enforcement notice is void. *Francis'* case established that an enforcement notice is void if it wrongly recited that development was carried out without the grant of planning permission—that is such an error in the notice as to invalidate it. In the present case the appellant relies on permission granted by the General Development Order, as a result of which the recital in the notice is wrong, and, following *Francis'* case, the notice is a nullity. Even if the invalidity of the notice was a point which the appellant could have taken before the justices under section 23 of the Act of 1947, section 24 (2) does not bar the point being taken before this court.

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[2] Town and Country Planning General Development Order, 1950, art. 3 (1): "... development of any "class specified in the First Schedule "to this Order is permitted by this "Order and may be undertaken ... "without the permission of the local "planning authority or the Minis- "ter. ..."
Sch. I: "The following develop- "ment is permitted under Article 3 "of this Order. ... Class IV, 2. "The use of land ... for any purpose "on not more than 28 days in total "in any calendar year, and the erec- "tion or placing of movable struc- "tures on the land for the purposes "of that use."

[3] [1958] 1 Q.B. 478; [1957] 3 W.L.R. 919; [1957] 3 All E.R. 529.

An enforcement notice can only be served if there is development without permission or if there is a breach of a condition under which permission was granted. If it can be shown that there was permission for development, albeit for 28 days only under the General Development Order, then there is a misrecital in the beginning of the notice and it is void. The court has to be satisfied, however, that that permission for 28 days is in fact a permission and not an exemption from permission. Sometimes the Act provides that acts are not to be development, as in section 12 (2), and sometimes it provides that permission is not required, as in section 12 (5). But section 13 (1) is framed quite differently; it in terms provides for the grant of permission by an Order such as the General Development Order, and section 13 (2) reinforces this view. Article 3 (1) and the opening words of the First Schedule to the Order are also explicit in this sense. The permission given by the Order is for development for 28 days, subject to two standard conditions set out in Part II of the Schedule, and that permission must be permission granted under the Act. When the initial change to a caravan site took place, it did so with permission for 28 days, and therefore the recital in the notice is wrong. In the present circumstances it might be difficult to frame a valid enforcement notice; it might have been better had the county council framed the notice as a breach of condition. But one cannot treat the General Development Order as an implied condition to cease development after 28 days, otherwise one would be unable to start development with temporary permission. To return to the First Schedule, there is a remarkable contrast between the conditions attached to each of the two limbs of Class IV.

The notice is also bad for want of particularity, because it does not state when the land was used as a caravan site, and that use may or may not be the material change of use alleged. The notice gives no indication of when the change of use took place. It is essential for the owners to know when the development is alleged to have been carried out, because an enforcement notice must be served within four years from the date of the development taking place; in any event, by failing to state the date of the development, there is the possibility that the development took place before the Act. Further, the notice does not specify the nature of the development in that it does not specify the use of the land prior to the development. [Reference was made to *East Riding County Council* v. *Park Estate* (*Bridlington*) *Ltd.*[4]]

There are two further points, first, that the facts alleged did not amount to a breach of the enforcement notice, and, secondly, that the prosecution was out of time. A requirement to discontinue the user does not amount to sterilisation of the land. All that is required is a single act of discontinuance, and once that is done the enforcement notice is satisfied. All that the appellant had to do was to discontinue the use on April 10; if he did so, he was not in breach; if he did not, he was. The second point is really the same, in so far as there is nothing in this Act to make the offence a continuing one and the notice was served more than four years after the date of the development. [Reference was made to *Postill* v. *East Riding County Council.*[5]]

F. H. Lawton Q.C. and *John Marriage* for the county council. The court is asked to approach the problem from the point of view of the county council: the appellant had been using the land as a caravan site since 1954; he had applied for planning permission and, despite its refusal, had continued to use the land, not for 28 days in any year but for some four years. It followed that on any view the appellant was using the land in an illegal manner. For certain types of illegality the local authority can go onto the land themselves (see section 24 (1)); but for unlawful user the local authority have to serve a notice. In drawing up the notice they can say either that development has been carried out without permission or that a condition under which development was allowed had been broken. In the present case the appellant did not have permission. It had been refused. Accordingly, the county council had to see whether there was any breach of condition: see section 13 (1), which provides for permission for development by an order. In section 13 (2) "any "such order" must apply to both the General Development Order and to special orders. Therefore one had to see whether the appellant had broken any condition of any order, be it a special order or the General Development Order. Since no special order was made, he could not have broken any condition of a special order. So far as permission under the General Development Order is concerned, the relevant permission is in the First Schedule, Class IV, which permission is not under the heading of condition but of description and development. The 28 days' user is not a condition; if anything, it is a limitation on the degree of use one may make of the land.

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[4] [1957] A.C. 223; [1956] 3 W.L.R. 312; [1956] 2 All E.R. 669.

[5] [1956] 2 Q.B. 386; [1956] 3 W.L.R. 334; [1956] 2 All E.R. 685.

On a literal construction of section 12 of the Act of 1947, if anyone with a paddock allowed it to be used for a garden fete and put up a marquee, that would require permission. To avoid that, the legislature, by enacting the provision in Schedule I, Class IV, of the Order, have provided that it can be done if it is not for more than 28 days in a year; that provision is an application of the de minimis rule. But, nevertheless, the power to make orders in section 13 includes a power to grant permission subject to such conditions or limitations as may be so specified. Section 24 (3), which provides for the penalties, refers only to conditions and not to limitations. Although a penal statute must be construed strictly, it must also be done properly. If there is a grant of permission by the General Development Order, and yet no breach of condition, how can an enforcement notice be framed? The Act of 1947 and the General Development Order, which apply to the whole of the country, would be incapable of enforcement. Looking at the whole scheme of the Act, an intermittent user of 28 days in any year does not constitute a change of user. The only effect of the General Development Order is to provide that a different use which only operates on 28 days in any year should be ignored as de minimis. Intermittent user for

28 days is the description of the development and not a condition in Class IV.

The effect of the Order of 1950 is to say that an intermittent user for 28 days is a user for which permission is not required. If a use is illegal, the person on whom the enforcement notice is served must show that he had permission or complied with the conditions imposed on the grant of permission. It is conceded that on the literal construction of sections 12 and 13 the county council is in difficulties if section 13 means what the appellant submits it means; but that literal interpretation creates an impasse and the purpose of the Act would be frustrated. The solution which Parker L.J. put forward in *Francis'* case [6] that there would be a breach of an implied condition cannot be right. It is conceded that the words of the relevant sections support the appellant's case.

[LORD PARKER C.J. Before you can rewrite the sections you have to show an ambiguity or implied condition; what alternative would you suggest to make your argument tenable?]

[SALMON J. How would you alter article 3 of the Order?]

Article 3 really means that development under the Schedule shall not be development under the Act.

[SALMON J. But that is contrary to section 13.]

The general intention of section 13 is that the Minister shall provide in what circumstances persons must apply for permission, and enables the Minister to decide when one has to obtain permission.

It must be conceded that on the literal construction of sections 12 and 13 of the Act and article 3 of the Order there has been permission of some kind, but the consequence of that is, or may be, that the Act cannot be enforced. If permission is granted subject to an implied condition that one may not continue the change of user for more than 28 days, and permission may be withdrawn if one does, then the appellant would be in breach of condition. But does that failure to discontinue after 28 days amount to a breach of condition? The difficulty is that no condition is specifically referred to. In section 23 it would probably be necessary to insert some words such as "other than development "allowed under the General Development Order," and then the four years would start from the date of the development which was the development allowed under the Order.

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[6] [1958] 1 Q.B. 478, 493.

Megarry Q.C. in reply. One does not know whether the words "conditions or limitations" in section 13 (2) are conjunctive or disjunctive. There is no reason why a limitation should not give birth to an implied condition.

LORD PARKER C.J. This is another of the many difficult cases which have arisen in regard to an enforcement notice under section 23 of the Town and Country Planning Act, 1947. The matter comes before the court by way of case stated by justices for the petty sessional division of Romford, before whom the appellant was charged that he on April 14, 1958, at Romford, "without the grant of permission in that behalf under Part III "of the Town and Country Planning Act, 1947, used certain land "at Cummings Hall Farm, Bear Lane, Romford, for the purpose "of a caravan site in contravention of an enforcement notice "dated December 12, 1956, which required such use to be discontinued, contrary to section 24 of the Town and Country "Planning Act, 1947."

The justices were faced with a number of technical points which were taken by the appellant, who was the party charged, and one has very great sympathy with them when, all the merits being with the respondents, the Essex County Council, they thought nothing of the points raised, and indeed did not require the county council to argue upon them. They accordingly found the offence proved and fined the appellant £20.

The short facts giving rise to the matter were these: The appellant was at all material times the owner of a little over six acres of land which apparently, prior to 1954, were used as a smallholding. In 1954 he allowed caravans to be parked on the land, and by January 21, 1955, the number had increased to about 90 caravans. Application was made to the local planning authority for planning permission and it was refused. There was an appeal to the Minister, a local inquiry was held, and in due course on July 19, 1956, the Minister gave his decision, which, quite shortly, was to the effect that he had decided that the appeal must be dismissed, but that: "While he deprecates the "bringing of this camp into use without planning permission, he "has much sympathy with the caravan occupiers and he relies "on the county council to give full weight to the need to avoid "hardship in pursuing any enforcement action they may see fit "to take."

Thereupon, on December 12, 1956, the county council served an enforcement notice on the appellant requiring him within three calendar months of the date when the notice was to take effect "to discontinue the use of the said land comprising the said "development and to restore the said land to its condition before "the said development took place such restoration to be carried "out to the satisfaction of the county planning adviser." I must refer in due course in more detail to the enforcement notice. That enforcement notice was enclosed in a letter of the same date in which the county council, in giving effect to the hopes expressed by the Minister, informed the appellant that they would not prosecute provided, to put it generally, he took steps gradually to reduce the number of caravans and, ultimately, in three years, to discontinue the use. However, by March 11, 1958, the county council were not satisfied that the appellant was complying with that offer; indeed, it appeared that there were then over 100 caravans still on the site, and so they wrote to the appellant again and, in effect, said that if the number of caravans was not substantially reduced, in fact to some 56 in number by April 14, 1958, they would prosecute. In due course, the appellant having taken no steps in the matter, this information was laid. Pausing there, I should have thought the merits were wholly with the county council. The appellant has flagrantly avoided compliance with the intentions of the planning authority and the Minister, but a number of technical points have been raised, and whether technical or not, if they are good points, the appellant is entitled to succeed.

The prosecution here was under section 24 of the Act of 1947, subsection (3) of which provides: "Where, by virtue of an "enforcement notice, any use of land is required to be discon-"tinued, or any conditions are required to be complied with in "respect of any use of land or in respect of the carrying out of "any operations thereon, then if any person, without the grant "of permission in that behalf under this Part of this Act, uses "the land or causes or permits the land to be used, or carries "out or causes or permits to be carried out those operations, in "contravention of the notice, he shall be guilty of an offence and "liable on summary conviction to a fine . . ." Be it observed that it is a condition precedent that there should be an enforcement notice and, of course, a valid enforcement notice.

Mr. Megarry, on the appellant's behalf, takes first and foremost the point that this was not a valid enforcement notice in that what I may call the factual basis of it was incorrect, and he refers to the decision of the Court of Appeal in *Francis* v. *Yiewsley* *and West Drayton Urban District Council.*[1] It is unnecessary to refer to the details of that case. In that case, however, the enforcement notice had recited that the land was developed by the placing thereon of caravans without the grant of the planning permission required. In fact, although when the development by the placing of caravans on the site first took place there was no permission, there had been later, pursuant to section 18 of the Act, what I may call a retrospective permission by the Minister which was to be for a period of six months. The Court of Appeal held that in those circumstances the recital in the enforcement notice was wrong in that permission had been obtained, albeit retrospectively, and they went on further to hold—and that is the important point of the decision from the point of view of the present case—that the recital being wrong the whole enforcement notice was a nullity.

In the present case Mr. Megarry points to the fact that under the Town and Country Planning General Development Order, 1950, the following development is permitted by the First Schedule, Class IV, paragraph 2: " The use of land . . . for any " purpose on not more than 28 days in total in any calendar " year, and the erection or placing of movable structures on the " land for the purposes of that use." Accordingly, says Mr. Megarry, this is really an a fortiori case in the light of *Francis* v. *Yiewsley and West Drayton Urban District Council*[2] in that on the first day when caravans were brought on to the site there was certainly then a change of use and therefore a development, and there existed permission pursuant to that General Development Order. The enforcement notice recites: " Whereas it appears to " the county council that development consisting of a material " change of use has been carried out on the land described in the " Schedule hereto without the grant of permission required in that " behalf under Part III of the Act, the said land being used for " the purpose of a caravan site." Accordingly, says Mr. Megarry, when that development first took place, when caravans were first brought on to this site, there was, in fact, permission under Part III of this Act in that the General Development Order made, as I shall refer in a moment under section 13 of the Act, had permitted that development.

In order to test the validity of that argument, it is necessary to look at a few of the sections of the Act itself. Part III, which is the relevant Part, commences with section 12 which, so far as is material, provides: "(1) Subject to the provisions of this section "and to the following provisions of this Act, permission shall be "required under this Part of this Act in respect of any development of land which is carried out after the appointed day. (2) In "this Act, except where the context otherwise requires, the "expression 'development' means the carrying out of building, "engineering, mining and other operations in, on, over or under "land, or the making of any material change in the use of any "buildings or other land: . . ." The subsection then goes on, by a series of paragraphs in a proviso to provide that certain changes of use of land shall not be deemed to be development at all. Then, by subsection (5), certain other development is referred to which, though deemed to be development, shall not be development for which permission is required. Section 13 (1) provides: "The Minister shall by order provide for the grant of permission "for the development of land under this Part of this Act, and "such permission may be granted—(*a*) in the case of any development specified in any such order, or in the case of development "of any class so specified, by that order itself; (*b*) in any other "case, by the local planning authority (or, in the cases hereinafter provided, by the Minister) on an application in that behalf "made to the local planning authority in accordance with the "provisions of the order." Accordingly, it will be seen that the scheme of the Act was first, to exclude certain types of development by saying they shall not be development at all; secondly, to set up a second category of development which, though it remain development under the Act, shall not require permission; and thirdly, to provide that in all other cases permission is required and may be granted either by a development order specifying any classes of development and, in other cases by what one might call the ordinary applications to the local planning authority and, through the planning authority to the Minister for permission to develop. Observe that in the passage I have read in section 13 it is saying that permission "may be granted," and if one looks further on in that same section there is a constant reference to that. Thus, in subsection (2) it is provided: "An order under "subsection (1) of this section . . . may be made either as a "general order applicable . . . to all land, or as a special order "applicable only to such land as may be so specified, and the "permission granted by any such order may be granted either "unconditionally or subject to such conditions or limitations as "may be so specified." Accordingly, again that provision in referring, as it does, to the general order as well as the special order is speaking of permission being thereby granted; indeed, in subsection (3) and subsection (4) there are phrases to the same effect. Therefore, it seems to me clear that a permission which appears by reason of inclusion in the First Schedule to the General Development Order of 1950 is not an exception from the obtaining of permission, but is itself the grant of permission. Accordingly, I think, and indeed I think Mr. Lawton would concede, that on a literal interpretation of those sections the use of the land for 28 days as a caravan site was a permission granted under Part III of the Act.

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[1] [1958] 1 Q.B. 478; [1957] 3 W.L.R. 919; [1957] 3 All E.R. 529.

[2] Ibid.

When one gets to section 23, which is providing for the enforcement notice, it provides: "(1) If it appears to the local "planning authority that any development of land has been "carried out after the appointed day without the grant of permission required in that behalf under this Part of this Act, or that "any conditions subject to which such permission was granted "in respect of any development have not been complied with" the authority may, within four years of such development being carried out, serve on the owner and occupier an enforcement notice. Accordingly, it seems to me clear that in a case where the General Development Order applies, there has been the grant of permission required in that behalf under this Part of this Act, and if that be right the recital in the enforcement notice in the present case is not true in fact. Its basis is inaccurate, and on the authority of the Court of Appeal in *Francis* v. *Yiewsley and West Drayton Urban District Council*[3] the enforcement notice is a nullity.

As I have said, it is a point of no merit. Certainly nobody was deceived, least of all the appellant, as to what he was being required to do, but these provisions are provisions which have to be strictly complied with. As Lord Simonds said in *East Riding County Council* v. *Park Estate* (*Bridlington*) *Ltd.*[4]: "It was, in "the first place, contended that the Act was highly technical and, "as it encroached on private rights, the court must insist on "strict and rigid adherence to formalities. This, as a general "proposition, commands assent, and not the less because dis"regard of an enforcement notice is an offence involving suffici"ently serious penal consequences."

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[3] [1958] 1 Q.B. 478.

[4] [1957] A.C. 223, 233; [1956] 3 W.L.R. 312; [1956] 2 All E.R. 669.

It is said on the other side that the court should not give the literal interpretation to the words in the various sections to which I have referred, in that to do so would really drive a coach-and-four through the powers of local authorities in regard to enforcement notices. It is said that, unless the permission for the temporary user for 28 days is treated as a conditional permission it would be quite impossible to frame an enforcement notice which was valid, and arguments have been addressed to the court to suggest that the permission for the 28-day user is not a conditional permission at all. I do not propose in the present case to decide what the effect of that provision is, whether it can be said that it is merely a description of a limited development or whether it is a development with an implied condition that it shall cease at the end of 28 days. I find it unnecessary to decide that because, even if it is not a condition—and I think I suggested in *Francis* v. *Yiewsley and West Drayton Urban District Council*,[5] that this or similar permission might be conditional—even if I were quite wrong in that, I cannot think that this is a case where the court in effect is entitled to rewrite an Act of Parliament. It is not merely a case where the insertion of a word by necessary implication will cure the mischief. It is not a case, as sometimes happens, where the court is constrained to use the word " or " and make it conjunctive or anything like that. It is a matter of rewriting a considerable number of sections in an Act of Parliament. Lord Simonds in *Magor and St. Mellons Rural District Council* v. *Newport Corporation*[6] gave a sharp reminder of the dangers of a court usurping the powers of the legislature. I need not refer to the passages because they are well known. I feel that the words in the Act are so clear that whatever their effect may be in the end this court must give effect to them.

I should add that two other points were taken which, if valid, would not necessitate what I may call the rewriting of the Act at all. It is said, first, that in section 12 (2) there is a definition of " development " which is the meaning in the Act except where the context otherwise requires. It has been said that when one comes to section 23 (1) it might be possible to read " development " there as meaning something different, in particular, as applying to a continued use of a permitted use after the permission had expired. I find it impossible to say that there is any context in section 23 which requires such an interpretation.

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[5] [1958] 1 Q.B. 478, 493.

[6] [1952] A.C. 189, 191; [1951] 2 T.L.R. 935; [1951] 2 All E.R. 839.

Certainly the context of the General Development Order of 1950 itself cannot be imported. The most that could be said would be that section 13 has intervened between section 12 and section 23, but there is nothing in section 13 which would suggest that a temporary user for 28 days, such as we are considering here, was going to be a matter for a General Development Order.

Secondly, it has been suggested that it might be possible to read "permission required" in section 23 as referring only to the permission required in the ordinary sense, namely, by applications made to the local authority and through the local authority to the Minister, and that in this context "permission required" does not refer to a general permission, if one may use that phrase, as under the General Development Order of 1950. Again, I find it quite impossible under the scheme in this Act to which I have referred to say that "permission required" in section 23 is limited in that way. In particular, I think it is relevant to observe that section 13 deals in one and the same section and in one and the same subsection with permissions which may be granted whether it be on an application to the local authority in individual cases or whether by means of a general or special order. In my judgment, sorry as I am to come to that conclusion, I fear that the technical point succeeds and that this appeal must be allowed.

I would only add that Mr. Megarry took several other points as to the validity of the enforcement notice, and he further contended that the prosecution was too late in point of time. In view of the opinion at which I have arrived on his main point, I find it unnecessary to deal with his other points, and I do not propose to do so.

DONOVAN J. I feel bound, and with the like reluctance, to agree. The construction which this court is now putting upon the words in section 23 (1) of the Act of 1947 "permission required "in that behalf under this Part of this Act," namely, that such permission is given, inter alia, by the General Development Order of 1950 granting 28 days' permission, is a construction which will make the enforcement of planning control even more difficult than it is already, and perhaps in a large number of cases impossible. For that reason I have sought a construction of the words which would avoid the result which I do not think Parliament could ever have intended. In this search I have failed. I think the words themselves are clear, and it is not necessarily the case that the

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purpose of the Act will be completely defeated if the words are given their ordinary meaning.

In these circumstances, I agree that the modifications in the language of sections 12, 23 and 24 of the Act of 1947 which would be required to defeat the appellant's argument here are not, as a matter of construction, justified. Furthermore, I think that the difficulty can probably be cured by a simple amendment, for example, of sections 23 and 24 of the Act to the effect that in the application of those sections any permission granted under paragraph 2 of class 4 of the First Schedule to the General Development Order of 1950 should be disregarded.

Salmon J. I agree.

Appeal allowed.

Solicitors: *James & Charles Dodd; Sharpe, Pritchard & Co. for the Solicitor, Essex County Council.*

C. J. E.

REARDON SMITH LINE LTD. *v.* MINISTRY OF AGRICULTURE, FISHERIES AND FOOD.

GARIBALDI SOCIETA COOPERATIVE DI NAVIGAZIONE A.R.L. *v.* PRESIDENT OF INDIA.

CARLTON STEAMSHIP CO. LTD. AND ANOTHER *v.* MINISTRY OF AGRICULTURE, FISHERIES AND FOOD.

CAPE OF GOOD HOPE MOTOR SHIP CO. LTD. *v.* SAME.

MIRAMAR COMPANIA NAVIERA S.A. *v.* GOVERNMENT OF THE UNION OF SOUTH AFRICA.

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June 9, 10, 11, 12, 15, 16, 17, 18, 20, 22, 23, 24, 25, 26, 29, 30;
July 1, 2, 3, 6, 7, 30;
Oct. 15.

McNair J.

Shipping — Charterparty — Demurrage — Exceptions clause — Charterers excused if loading of cargo delayed by "force majeure, . . . "strikes, . . . or any other hindrance of whatsoever nature beyond "the charterers' control"—Strike preventing loading at nominated port—Duty of charterers to make fresh nomination—Alternative cargoes—"Weather working days"—Treatment of Saturdays.

[Reported by Miss Eira Caryl-Thomas, Barrister-at-Law.]

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REARDON SMITH LINE LTD.
v.
MINISTRY OF AGRICULTURE, FISHERIES AND FOOD.

GARIBALDI SOCIETA CO-OPERATIVE DI NAVIGAZIONE A.R.L.
v.
PRESIDENT OF INDIA.

CARLTON STEAMSHIP CO. LTD.
v.
MINISTRY OF AGRICULTURE, FISHERIES AND FOOD.

CAPE OF GOOD HOPE MOTOR SHIP CO. LTD.
v.
SAME.

MIRAMAR COMPANIA NAVIERA S.A.
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Shipping — Charterparty — Cargo — Alternative cargo — Loading of intended cargo delayed—Duty of charterer to exercise alternative cargo option—Burden of proving that alternative cargo could have been shipped.

Shipping — Charterparty — Demurrage — Exceptions clause — Charterers excused if loading “of the cargo or the intended cargo” delayed by “force majeure, . . . strikes, . . . or any other hindrance “of whatsoever nature beyond the charterers' control”—Strike at nominated port—Direction of Canadian Wheat Board preventing loading of cargo intended by charterers—Whether bound to load alternative cargo—Whether bound to nominate alternative port—“Weather working days”—Treatment of Saturdays—Reversible lay days—Dispatch payable on “time saved including Sundays.”

Shipping—Charterparty—Arrived ship—Ship prevented from arriving because no cargo available.

Shipping—Charterparty—Cargo, obligation of charterer to provide—Ship unable to become an arrived ship unless cargo immediately available—Exceptions clause.

Contract—Frustration—Strike—Whether frustrating charterparty.

Election or Option—Election or selection—Charterparty—Right to nominate—Cargo—Port.

Words and Phrases—“Cargo or intended cargo.” “Force majeure.” “Other hindrance beyond charterer's control.” “Weather working “day.” “Working day.” “Reversible.” “Time saved.”

Ships' Names—Queen City. Riverton. Cape Rodney. Agostino Bertani. Moderator.

By four charterparties, dated respectively November 12 and 28, 1952, January 19, 1953, and March 12, 1953, it was provided that “ . . . Vessel shall proceed in ballast and, upon arrival, be made “ready, and shall receive on board at Tacoma and/or Seattle or “Portland Oregon, Vancouver B.C. or New Westminster or Victoria B.C. or other loading places as hereinafter provided . . . a “full and complete cargo . . . of wheat in bulk, . . . and/or barley “in bulk and/or flour in sacks as below which [the charterers] bind “themselves shall be shipped. . . .” In two of the charterparties it was further provided “Charterer has the option of loading up to “one-third of barley in bulk. . . . Charterer has the option of “loading up to one-third cargo of flour in bags. . . .” In the third charterparty the loading port and barley options were the same but the flour option was expressed as an option to load “a full cargo of “flour in bags . . . ,” and in the fourth the port options were the same but there were no alternative cargo options. By a fifth charterparty, dated April 2, 1953, the port options were confined to Vancouver/New Westminster and Victoria and there was no alternative cargo option.

By the first four charterparties it was further provided that “. . . “Vessel to proceed to such usual loading place or places where she “can safely load always afloat as may be ordered by the charterers “. . . and there receive the cargo in manner customary, alongside, “afloat and/or from the wharf and/or elevators . . . Six weather “working lay days (Sundays, holidays, and rainy days not to be "counted as lay or working days . . .) to commence twenty-four hours after receipt by charterers' agents at loading ports of the captain's written notice of readiness accompanied by the surveyor's certificate that his vessel is . . . ready to receive cargo whether in berth or not are to be allowed the charterers for loading . . . Despatch money . . . shall be payable for all working time saved in loading at the rate of one-half of demurrage rate per day or pro rata. . . ." By an exceptions clause, "Lay or working days shall not count at ports of loading during any time when the supply or loading of stiffening, or the supply or bringing by rail, craft or otherwise to port of loading or alongside the vessel, or the loading of the cargo or the intended cargo, or any part thereof, is delayed by . . . force majeure, . . . strikes, . . . or any other hindrance of whatsoever nature beyond the charterers' control . . ."

In the fifth charterparty, the words "whether in berth or not" were omitted, but by that charterparty it was provided that "Loading and discharging time shall be reversible . . . If the grain elevators at Vancouver or New Westminster or Victoria B.C. are strike-bound when vessel is seven days off Vancouver, this charterparty to be null and void."

As a result of a strike on February 17, 1953, of elevator men at five out of the seven elevators at Vancouver, and at the single elevator at New Westminster, 31 tramp vessels (including the five to which the charterparties referred to above related) chartered to load full cargoes of wheat, and arriving at the port after the strike began, were subject to serious delays since no full cargoes of wheat were loaded there during the strike. In addition, a number of other tramps were diverted to U.S. ports or had their charters either cancelled by agreement or otherwise postponed. During the strike, though no tramps (with one exception) loaded wheat in bulk from the two elevators not affected by the strike, from these two elevators wheat in bulk amounting to 63,435 tons was by direction of the Canadian Wheat Board loaded as parcel cargoes into liners, and when the loading of bulk wheat into tramps was resumed after the strike ended the tramps were loaded in the order of their arrival at Vancouver.

On claims for demurrage and despatch money in the five selected cases:—

Held, (1) that it was impossible to imply into these charterparties any limitation upon the charterers' rights so as to preclude them from nominating a loading port which was strike-bound (in the sense of being a port at which loading of the vessel could not take place within a reasonable time or without such delay as would frustrate the commercial object of the adventure) or to impose upon them an obligation to make a fresh nomination when the port originally nominated became strike-bound (post, pp. 489, 490).

Dobell & Co. v. *Green & Co.* [1900] 1 Q.B. 526; dicta of Parker L.J. in *Agrimpex Hungarian Trading Co. for Agricultural Products* v. *Sociedad Financiera de Bienes Raices* (*The Aello*) [1958] 2 Q.B. 385, 405 applied.

Brightman & Co. v. *Bunge y Born Limitada Sociedad* [1924] 2 K.B. 619; *The Teutonia* (1872) L.R. 4 P.C. 171 distinguished.

Tharsis Sulphur and Copper Co. v. *Morel Bros. & Co.* [1891] 2 Q.B. 647; *Bulman and Dickson* v. *Fenwick & Co.* [1894] 1 Q.B. 179 considered.

(2) That the charterers were protected by the exceptions clause (post, p. 501) because (a) (post, p. 495) there was no settled rule of construction that a specific exception, such as strikes, could not be relied upon if the strike was operative at the time when the contract was made or the ship ordered to the affected port; for in view of the peculiar nature of strikes it could never be said in any particular case that a ship was doomed or that delay was inevitable.

France Fenwick & Co. v. *Spackman (Philip) & Sons* (1912) 18 Com.Cas. 52; *Ciampa* v. *British India S.N. Co. Ltd.* [1915] 2 K.B. 774; *Taylor* v. *John Lewis Ltd.*, 1927 S.C. 891; *Safadi* v. *Western Assurance Co.* (1933) 46 Ll.L.Rep. 140; *S.S. Induna* v. *British Phosphate Commissioners* [1949] 2 K.B. 430 distinguished.

(b) There was no authority to support the proposition that because work was going on in the port throughout the strike, the charterers could not bring themselves within the exceptions clause (post, p. 499).

In re Richardsons and Samuel (M.) & Co. [1898] 1 Q.B. 261; *Central Argentine Railway Ltd.* v. *Marwood* [1915] A.C. 981 distinguished.

(c) The charterers were protected by the exceptions of "force "majeure" and "any other hindrance of whatsoever nature beyond "the charterers' control," since the Canadian Wheat Board was not the agent of the charterers in making and acting upon its policy direction (post, p. 497).

Crawford & Rowat v. *Wilson, Sons & Co.* (1895) 1 Com.Cas. 154 applied.

(3) That (a) no obligation to exercise any of the alternative cargoes options was imposed on the charterers; once it was proved or admitted in each case (i) that the charterers intended to load wheat in bulk and (ii) that the supply or bringing to the port of loading or alongside the vessel or the loading of that intended cargo was delayed by the specific exceptions, the exceptions clause operated and must be given its literal effect (post, p. 505).

Brightman & Co. v. *Bunge y Born Limitada Sociedad* [1924] 2 K.B. 619 and *South African Dispatch Line* v. *S.S. Niki (Owners)* [1959] 1 Q.B. 238 (affirmed post, p. 518) distinguished.

(b) If, however, the charterers succeeded only for the time being in bringing themselves within the protection of the clause and remained under the burden of fulfilling their original obligation of loading a full and complete cargo, the onus would remain on them to show that they required a reasonable time to change over and that, if they had changed over, the delay would have been the same (post, p. 506).

(4) That, in relation to the fifth charterparty, the charterers, having made proper arrangements for the supply and bringing down of the cargo, were not in breach of their obligations in having no

cargo available for the vessel at any material time, nor were they in breach in knowing at the time they ordered the vessel to the port and at all material times thereafter that they had no cargo and no contract for the acquisition thereof and no reasonable prospects of obtaining the necessary cargo at the port within a reasonable time (post, pp. 514, 515).

Ardan Steamship Co. v. *Andrew Weir & Co.* [1905] A.C. 501; *The Aello* [1958] 2 Q.B. 385 distinguished.

(5) The issue whether Saturday counts as a "working day" or not, or half a working day must be determined with reference to the particular trade involved (post, p. 510).

Robert Dollar & Co. v. *Blood, Holman & Co.* (1920) 4 Ll.L.Rep. 343; *Love & Stewart Ltd.* v. *Rowtor Steamship Co. Ltd.* [1916] 2 A.C. 527; *"Z" Steamship Co. Ltd.* v. *Amtorg New York* (1938) 61 Ll.L.Rep. 97 considered.

Meaning of "working day," and effect of bad weather preventing discharge for part of day, considered (post, p. 515).

Alvion Steamship Corporation Panama v. *Galban Lobo Trading Co. S.A. of Havana* [1955] 1 Q.B. 430 applied (post, p. 508).

Effect of making lay days reversible considered (post, p. 516).

Meaning of dispatch payable on "time saved including Sundays "and holidays" considered (post, p. 517).

ACTION.

The following facts are taken substantially from the judgment:

On February 17, 1953, a strike of elevator men at five out of the seven elevators at Vancouver and at the single elevator at the neighbouring port of New Westminster, which together normally handled 85/87 per cent. of the bulk grain shipments from those ports, broke out and continued without interruption until May 7, a period of 82 days. As a result 31 tramp vessels chartered by the Ministry of Food and the Governments of India and South Africa to load full cargoes of wheat and arriving in Vancouver after the strike began, were subject to very serious delays, since no full cargoes of wheat were loaded there during the strike. In addition a number of other tramps were diverted to U.S. ports or had their charters either cancelled by agreement or otherwise postponed.

The shipowning interests and the three governments concerned selected five cases which were the subject of five separate actions.

The five cases selected were as follows:

(a) The *Queen City*. This vessel was chartered by the Ministry of Food on November 12, 1952, was ordered to Vancouver on February 12, 1953, and gave notice of readiness to load on February 18, commenced loading on May 7 and completed on May 12.

(b) The *Riverton*. This vessel was chartered by the Ministry of Food on November 28, 1952, was ordered to Vancouver on March 22, 1953, gave notice of readiness to load on March 25, commenced loading May 7 and completed on May 12.

(c) The *Cape Rodney*. This vessel was chartered by the Ministry of Food on January 19, 1953, was ordered to Vancouver on March 27, gave notice of readiness on April 2, commenced loading on May 13 and completed loading on May 15.

(d) The *Agostino Bertani*. This vessel was chartered by the President of India on March 12, 1953 (i.e., after the strike began), was ordered to Vancouver on April 23, gave notice of readiness on April 29, commenced loading on May 20 and completed loading on May 27.

(In each of these four cases the vessels were chartered on the terms of the Pacific Coast grain charter and the general terms of the relevant clauses of the charters were identical except for variations in the options as to the cargoes to be shipped. In each case the range of loading ports, in addition to the Canadian ports of Vancouver, New Westminster and Victoria, included the U.S. ports of Seattle/Tacoma and Portland. In each of these cases it was agreed that the ship was an "arrived ship" when she gave notice of readiness in view of the inclusion in the lay day clause in the charters of the words "whether in berth or not.")

The fifth case selected was:

(e) The *Moderator*. This vessel was chartered by the Government of South Africa on April 2, 1953 (i.e., during the strike), was ordered to Vancouver on June 4, gave notice of readiness on June 6, commenced loading on June 12 and completed loading on June 18, 1953.

In this case the main fabric of the charterparty was in the same form as in the other four cases, but a special provision was contained making lay days at loading ports and discharging ports reversible and a further special clause dealing with ordering to strike-bound ports.

During the strike, though no "tramps" (i.e., vessels chartered to load full cargoes), with one exception, loaded wheat in bulk from the two elevators at Vancouver not affected by the strike, in fact from these two elevators wheat in bulk amounting to 63,435 tons was by direction of the Canadian Wheat Board loaded as parcel cargoes into liners, i.e., vessels on regular scheduled services taking parcel cargoes of varying kinds for different shippers. Of this quantity 17,000 tons approximately

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went into liners chartered by persons other than the Ministry of Food, the Governments of India and of South Africa. Furthermore, when the loading of bulk wheat into tramps was resumed after the strike ended, the tramps were loaded substantially, if not wholly, in the order of their arrival at Vancouver.

The material terms of the charterparties were as follows:

The charterparty in the case of the *Queen City* provided (so far as is material) as follows (the words underlined being inserted in the printed form in type): " . . . Vessel shall proceed in ballast " and, upon arrival, be made ready, and shall receive on board " at Tacoma and/or Seattle or Portland Oregon, Vancouver B.C. " or New Westminster or Victoria B.C. or other loading places " as hereinafter provided . . . a full and complete cargo . . . " of wheat in bulk, any bags and/or bagging required for safe " stowage to be supplied and paid for by the shipowners, and/or " barley in bulk and/or flour in sacks as below which the said " parties of the second part " (viz., the charterers) " bind them- " selves shall be shipped, and being so loaded shall therewith " proceed to one safe port in the United Kingdom . . . or Continent " between Antwerp and Hamburg . . . or so near thereunto as " she may safely get and there deliver the same being paid freight " as hereinafter provided: 80/- per ton wheat. . . .

" Charterer has the option of loading up to one third of barley " in bulk in which case the above rate of freight is increased by " 2/6d. per ton on the quantity of barley loaded. Charterer has " the option of loading up to one third cargo of flour in bags at " 10/- per ton extra over the rate of freight for wheat on the " quantity of flour loaded if loaded in British Columbia, and " 12/6d. per ton extra if loaded at U.S. Pacific."

(In the case of the *Cape Rodney* the loading port and commodity options were the same: in the case of the *Riverton*, loading port and barley options were the same but the flour option was expressed as an option to load " a full cargo of flour " in bags at 10/- per ton extra over the rate for wheat if loaded " at British Columbia and 12/6d. per ton extra if loaded at U.S. " Pacific." In the case of the *Agostino Bertani*, the port options were the same but there were no alternative cargo options. In the case of the *Moderator*, the port options were confined to Vancouver/New Westminster and Victoria and there was no alternative cargo option.)

Clause 11. Readiness. " The Captain shall give charterers " usual written notice of readiness, accompanied by certificate of

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"charterers' competent surveyor that vessel is ready to take in "cargo and the quantity required. . . . Upon receipt of the said "written notice and certificate . . . charterers shall furnish the "vessel with the required cargo."

Clause 14. Loading places. "Vessel to proceed to such "usual loading place or places where she can safely load always "afloat as may be ordered by the charterers at Vancouver B.C. or "New Westminster or Victoria B.C. or Tacoma and/or Seattle or "Portland and/or Astoria and/or loading places in the Columbia "and/or Willamette Rivers, and there receive the cargo in manner "customary, alongside, afloat and/or from the wharf and/or "elevators. Should the vessel be required by charterers to move "more than twice after being in her loading berth, extra cost of "towage to be paid by them. . . ."

Clause 15. Lay days. "Six weather working lay days (Sun-"days, holidays, and rainy days not to be counted as lay or "working days . . .) to commence twenty-four hours after receipt "by charterers' agents at loading ports of the Captain's written "notice of readinesss accompanied by the surveyor's certificate "that his vessel is fitted with shifting boards and dunnage "according to underwriters' requirements and is ready to receive "cargo whether in berth or not are to be allowed the charterers "for loading at places as hereinbefore provided, but should the "loading be completed in less time the charterers have the privi-"lege of detaining the vessel until expiry of the said lay days."

Clause 16. Despatch money. "Despatch money (which is to "be paid to charterers before vessel sails) shall be payable for "all working time save in loading at the rate of one half of "demurrage rate per day or pro rata. . . ."

Clause 30. Demurrage and liens. "It is agreed that for each "and every day's detention or demurrage at the port of loading by "default of the" (charterers) "or their agents eightpence per "G.R.T. per day, or pro rata, shall be paid. . . ."

(The rates of demurrage and despatch respectively were subsequently altered to 10d. and 5d. by an amendment dated July 22, 1953.)

Clause 31. Act of God, war, etc. "Lay or working days "shall not count at ports of loading during any time when the "supply or loading of stiffening, or the supply or bringing by "rail, craft or otherwise to port of loading or alongside the vessel, "or the loading of the cargo or the intended cargo, or any part "thereof, is delayed by Act of God, war, restraint of princes,

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" rulers, or people, force majeure, blockade, quarantine, earth" quake, inundations, storms, floods, rain, snow, ice, fire, riots, " strikes, lock-outs, civil commotions, political disturbances or " impediments, holidays (ecclesiastical or civil), cessations or " stoppages of labour, epidemics, perils of the seas, railway " accidents or impediments or any other hindrance of whatsoever " nature beyond the charterers' control. . . ."

The following typed clauses were added to the printed form:

Clause 37: " Overtime at loading or discharging port to be for " the account of the party ordering it. If ordered by the Port " Controller or his representative charterer to pay all extra " expenses incurred."

Clause 38: " Despatch money and/or demurrage at loading " and/or discharging ports to be adjusted on completion of " discharge."

Clause 42: " Where charter calls for loading port orders, " Master to make application to Messrs. Thomson and Earle, " Vancouver . . . by wireless 96 hours before vessel is due to " arrive off Pacific Coast. Orders for loading port are to be given, " by wireless, within 48 hours of receipt of Master's application, " unless given earlier."

(In the case of the *Agostino Bertani*, application for loading port orders had to be made to the India Supply Mission at Washington.)

And in the case of the *Moderator*, the corresponding clause was as follows:

Clause 31: " The Master to wireless Sesostris Vancouver " (i.e., Empire Shipping Co. Ltd.) " when approximately 96 hours " off Vancouver giving time of expected arrival in the Vancouver " district. Loading orders to be given on receipt of the Master's " application to Sesostris on arrival in Vancouver district."

As stated above, the charterparties for the *Riverton*, *Cape Rodney* and *Agostino Bertani* were, so far as is material and save as aforesaid, in identical terms. The charterparty for the *Moderator* was also substantially the same except for the special provisions relating to reversible lay days and ordering to strike-bound ports, viz.: clause 27, which provides that loading and discharging time shall be " reversible "; and clause 36: " If the " grain elevators at Vancouver or New Westminster or Victoria " B.C. are strike-bound when vessel is seven days off Vancouver, " this charterparty to be null and void."

On September 19, 1952, the Ministry of Food entered into a master agreement with the Canadian Wheat Board for the purchase of wheat and flour for shipment from Canadian ports between August 1, 1952, and July 31, 1953. By this agreement the Board undertook to make available through its agents for sale to the Ministry between these dates 2,614,000 tons of wheat and 350,000 tons of flour at the current selling price for each grade, such purchases being registrable under the International Wheat Agreement, 1949. Of the 2,614,000 tons of wheat, 1,422,000 tons were to be made available for shipment from the St. Lawrence and Atlantic Winter ports, and 850,000 tons from Canadian Pacific Coast ports, of which approximately 100,000 tons were to be made available for each of the months, January, February and March, 1953, and 90,000 tons in each of the months of April and May, shipment of the total quantity of flour to be purchased from the mills to be a matter of arrangement between the Ministry and the mills concerned. It was further provided as follows: Clause 4 (c): "To facilitate the carrying out of this agreement "each party undertakes to advise the other party from time to "time of its progress in meeting supply requirements or in "securing tonnage as the case may be. While it is the intent "of this agreement that the respective parties will endeavour to "the best of their ability to make available the supplies to "meet the tonnage and the tonnage to lift the supplies, it is "agreed that failure to carry out their respective obligations in "that regard will not result in the charging by the Ministry of "demurrage charges to the Board or its agents or the charging "by the Board of any additional carrying charge to the Ministry "or its agents."

The Canadian Wheat Board (hereinafter referred to as the Board) was a statutory authority established under the Canadian Wheat Board Act, 1935, which, as in force at the material time, was to be found in the Revised Statutes of Canada, 1952, Ch. 44.

By section 4 (1) of the Act the Board had capacity to sue and be sued in the name of the Board, but by subsection (2) it was provided that "the Board is, for all purposes, an agent of Her "Majesty in right of Canada, and its powers under this Act may "be exercised by it only as an agent of Her Majesty in the said "right." It enjoyed the monopoly of exporting wheat and barley from parts of Canada known as "the designated areas" which together produced 95 per cent. of the grain fit for export. Parts of British Columbia were excluded from the designated territories and such export of grain as did take place from the ports of British Columbia so excluded was controlled by the Board by a licence or permit system. The object of the Board's incorporation was stated to be the marketing in an orderly manner in interprovincial and export trade of grain grown in Canada, and for that purpose it was given the wide powers set out in section 4 (4).

The Board exercised a large measure of autonomy as to the manner in which it exercised its powers; but by section 10 of the Act it was provided that "the Governor in Council may by "order not inconsistent with the provisions of this Act direct the "Board as to the manner in which any of its operations, powers "and duties under this Act shall be conducted, exercised or "performed."

Though the Board had apparently no express statutory power of control over the loading berths at the ports of shipment (unless such power was conferred by the general words in paragraph (*h*) of section 4 (4), it did in fact control such loading berths by reason of the fact that the property in the grain for export remained in the Board from the time it reached the up-country elevators until it was discharged from the terminal elevators at the port of shipment, the Board by its officers at the ports giving instructions to the terminal elevators as to the quantities and grades to be loaded into each ship, and giving instructions to the ship's agents as to the berth at which the ship was to receive the designated quantities and grades.

Captain Lancaster, the Harbour Master at Vancouver, agreed that "so far as ships loading grain berths are concerned, the "orders to do so are given by the Wheat Board and not by either "the Harbour Master or the Port Authority." No appropriation of any particular parcel of wheat took place until the elevator began to shoot it into the ship.

The grain was delivered by the prairie farmers into the up-country elevators situated by the railways and then passed into the ownership of the Board.

The two railway lines serving Vancouver and New Westminster were the Canadian Pacific Railway and the Canadian National Railway, in whose box cars the grain was loaded for transmission to the terminal elevators at Vancouver and New Westminster. The flow of grain from the up-country elevators to the terminal elevators was controlled by the Board.

As to the factual position as to the terminal elevators at Vancouver, New Westminster and Victoria:

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At Vancouver there were at all material times seven terminal elevators, viz.: (1) National Harbour Board No. 1 operated by Messrs. Kerr & Gifford, (2) National Harbour Board No. 2 leased to Saskatchewan Wheat Pool, (3) National Harbour Board No. 3 which was used for storage, the jetty alongside not being available for loading, (4) National Harbour Board No. 4 or Richardson's Columbia Elevator, (5) the Alberta Pacific Grain Elevator, (6) the Alberta Pool Elevator, and (7) the Midland Pacific or Burrows Elevator. Of these, five elevators, viz.: (1), (2), (3), (5) and (6) were strike-bound by reason of the strike of the elevator men from February 17 to May 7. Two, viz.: (4) National Harbour Board No. 4 or Richardson's, and (7) Midland Pacific or Burrows, were freely operating throughout the strike.

The single elevator at New Westminster was strike-bound throughout the strike, and the single elevator at Victoria was at the outbreak of the strike being used simply as a storage elevator for the storage of American maize. By the middle of March this maize had been moved and there was loaded from this elevator one full cargo of wheat on to the *S.S. Trelyon* which had arrived at Vancouver before the strike and before any of the vessels with which these actions are concerned, this wheat having after the strike been diverted to Victoria by the Transport Controller. There was some evidence that other smaller parcel shipments were made from Victoria on to liners, and there was never at Victoria sufficient to make up a full cargo.

The normal output of the six strike-bound elevators and of the two non-strike-bound elevators was of the order of 20,000 tons per day, of which the Midland Pacific handled about 10 per cent. and Richardson's 3 to 5 per cent. Richardson's never in normal times loaded a full cargo of wheat in bulk, and Midland Pacific very rarely, viz., one in every 12 to 18 months. This elevator concentrated on the loading of parcel cargoes of wheat into liners and by preference in the form of bagged wheat.

On February 17, 1953, there were in these eight elevators at Vancouver and New Westminster about 1,500,000 tons of wheat, of which about 3,400 tons was in Richardson's and about 13,500 tons in Midland Pacific, which had apparently been set aside for completion of contracts for bagged wheat. In normal times each of these elevators drew its supplies from particular up-country elevators.

As to the strike in relation to the dates upon which the vessels were nominated to and arrived at Vancouver: (For loading grain in bulk two classes of workmen were necessary—the elevator men and the longshoremen or stevedores—the latter never went on strike.)

Up to the time of the strike the elevator men at all the elevators referred to above, other than Richardson's and Midland Pacific, were organised in a local union known as "Local 433 "Grain," a branch of the International Union of Brewery, Flour, Soft Drinks and Distillery Workers of America. Up to the autumn of 1952 the elevator men working at these elevators were working under an agreement with their employers regulating wages and conditions which could be terminated by notice expiring at the end of November. Richardson's men and the Midland Pacific men were working under a separate agreement subject to a different termination date. Mr. E. C. Sims was the manager of Local 433 Branch.

In October, 1952, with a view to negotiating a new agreement for the elevator men, the union gave notice of termination in respect of the elevators other than Richardson's and Midland Pacific covered by the agreement and making six demands: (1) an overall wage increase of 12 cents an hour, (2) dust premium, (3) two statutory holidays with pay, (4) double time for Sunday pay, (5) night shift premium for work in the shift from midnight to 8 a.m., and (6) classification of jobs. Direct negotiations between the union and the employers took place and led to no result, and, accordingly, on January 2, 1953, a Conciliation Board appointed by or through the intervention of the Canadian Department of Labour met and heard representatives of both sides. The employers, so far from conceding any increase in wages, argued for a reduction in view of the alleged fall in the cost of living throughout Canada since the making of the previous agreement. On January 26 the Conciliation Board by a majority reported in favour of no change in pay but suggested certain minor amendments as to the fringe benefits. On February 3 the union notified their rejection of the report, and on February 4 the employers in turn rejected the report but offered a renewal of the 1952 agreement. A strike vote was taken and carried by the necessary two-thirds majority, and on or about February 10 notice was given that the strike would be effective as from midnight, February 16/17.

On February 12 the *Queen City* was ordered by the charterers to load at Vancouver, arriving at Vancouver and giving notice of readiness at 9.45 a.m. on February 18. Meanwhile, work stopped at all the elevators other than Richardson's and Midland Pacific as from midnight, February 16/17.

The Vancouver Chamber of Shipping on March 2 discussed and accepted, as being in the best interest of the community, a policy decision by the Board to confine the use of the two non-strike-bound elevators to the supply of parcels to "liners" or "F.I.O. bottoms." This decision affected about 100 liners and tramps arriving at Vancouver between February 17 and May 7.

Mr. Bernard Wilson, an official of the Federal Conciliation Service, arrived at Vancouver on March 9. On March 20 he returned to Ottawa, having put forward a new series of proposals which involved for the first time the suggestion that part of the matters in dispute should be referred to arbitration.

On March 22 the *Riverton*, and on March 27 the *Cape Rodney*, were ordered by the Ministry of Food to Vancouver.

On April 10 the operators agreed to accept arbitration but on April 11 the union refused.

On April 15 Mr. St. Laurent (the Prime Minister) in the House of Commons at Ottawa indicated that the Government might take over the elevators. But on April 17 Mr. Milner, the Federal Transport Controller, came to Vancouver and had unofficial discussions with the union officials and apparently with the operators which had these results: (1) that the operators, who up to that time had steadfastly refused to consider any wage increase, in an open letter to the union dated April 22 offered to submit all outstanding issues to the arbitration of a judge of the Supreme Court of one of the provinces of Canada; and (2) on April 23 the union offered to cut their wage demands by 5 cents per hour.

On April 23 the *Agostino Bertani* was ordered to Vancouver.

On April 30 a meeting took place between the union and the operators, this being the first meeting for many weeks; on May 7 the strike was settled.

It was agreed that for Vancouver the normal working hours on weekdays other than Saturdays were eight hours. By clause 15 of the charterparties (or clause 9 in the case of the *Moderator*) it was provided that six weather working lay days (Sundays, holidays and rainy days not to be counted as lay or working days) were to be allowed charterers for loading.

By letters dated March 2 and April 9, 1959, passing between the solicitors for the parties it was agreed after the evidence had been taken at Vancouver that at all material times the normal working hours in the port of Vancouver were for grain elevator operators a 5-day Monday to Friday 40-hour week, and for the longshoremen a 5½-day Monday to Saturday morning inclusive 44-hour week, and that the labour of both these classes of employees was essential for the operation of loading grain (scilicet) grain in bulk. For loading flour in bags the elevator men were not required, the work being performed by longshoremen working their normal week of 44 hours. There was also evidence that elevator men do work on Saturday when required, being paid overtime or premium pay of 1½ times the normal rate, but that they do not normally work on Saturdays. In fact, in the five cases with which these actions are concerned, no work was done on Saturday. If work had been done on Saturday, then by clause 37 of the charterparties in the cases other than the *Moderator*, the overtime would be for the account of the party ordering it. In the case of the *Moderator* it was provided by clause 25 as follows: "Overtime to be paid by the party ordering "it but in any case any overtime services rendered by ship "personally to be for ship's account."

In relation to the *Moderator* the factual position as to provision of cargo and the nomination of the loading berth was as follows: On June 4, 1952, the South African Wheat Board on behalf of the South African Government entered into a master-contract for the purchase of 150,000 long tons of wheat to be shipped from Pacific Coast between January and July, 1953. The *Moderator* was chartered to lift part of this quantity. On or about June 6, 1953, the charterers on receipt of the master's notice of readiness and statement that the vessel was being tendered to load about 10,100 tons bulk wheat, so advised Mr. Smith, the manager of the Canadian Wheat Board at Vancouver. They received in reply a letter dated June 8, 1953, in the following terms: "With regard "to your advice that the *S.S. Moderator* has been tendered to "you for loading and your request that we nominate a loading "berth from which a cargo of wheat will be supplied to her, we "wish to advise that all available berths are occupied at this "time and there are other vessels already waiting their turn to "load as berths become vacant. The *S.S. Moderator* is being "placed in rotation for loading in accordance with time of "presentation along with those other vessels in port awaiting "loading berths and a berth will be nominated in due course when "one is available."

The shipowners claimed demurrage and the charterers counterclaimed for dispatch money.

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Garibaldi Socifta Co-operative Di Navigazione A.R.L. v. President of India.

Carlton Steamship Co. Ltd. v. Ministry of Agriculture, Fisheries and Food.

Cape of Good Hope Motor Ship Co. Ltd. v. Same.

Miramar Compania Naviera S.A. v. Government of the Union of South Africa.

Eustace Roskill Q.C., *T. G. Roche Q.C.* and *A. J. Bateson* for the shipowners. The main point relates to the rights and liabilities of shipowners and charterers when the charterers order a ship to a strike-bound port, and the question whether, if the strike breaks out after the order, there is a duty on the charterers to nominate an alternative port. During the period of the strike in question 80,000 tons of wheat were loaded at Vancouver, practically all in liners. This was done deliberately as a result of a policy decision of the Canadian Wheat Board, from which the defendant Governments did not dissent, nor did they question it. No attempt was made by the defendants to load alternative cargoes, nor to divert to alternative ports, although they had the right in three cases to load at American ports where there were no strikes. The ships would have qualified as parcel ships for the liner queue if part optional cargoes (e.g., one-third flour) had been loaded. It is submitted that this strike was, from the start, inevitably bound to last a long time. It is also submitted that there was a failure by the charterers or their agents to fulfil their absolute obligation to supply a cargo, by reason of the Canadian Wheat Board's policy decision. The exceptions clause does not qualify this duty and relieve the charterers from their primary absolute obligation to load in laytime; it merely extends laytime. Further issues of fact in this case are whether it was reasonable to order these vessels to Vancouver; whether it was reasonable not to order them away from Vancouver; whether there was in fact barley and flour available to load as alternative cargoes; and what the position was in American ports in relation to berths and cargo.

The first of the principal points of law involved is whether the supply or bringing by rail to the port of loading or alongside the vessel or loading of cargo or intended cargo or any part thereof was delayed by force majeure, strike or any other hindrance of whatsoever nature beyond the charterers' control. It is submitted that the answer in all cases is "no"; alternatively, that in the first four cases it is "no." A charterer's duty is (a) to provide a cargo at a proper time, and (b) to load the cargo in lay days. Each duty is absolute unless qualified by exceptions. The exceptions clause does not qualify the obligation to provide cargo but only excuses delay in fulfilling it by extending laytime by excluding from it in certain stated events time which would otherwise be laytime. To qualify his obligation a charterer must show one of three things: (i) that he himself had enough cargo but was delayed in supplying or loading it; or (ii) that he had a contract with someone else to secure that the supply and loading was done and that person was delayed or prevented; or (iii) that even though neither (i) nor (ii) applied, it would not have made any difference, since he would inevitably have been prevented or delayed.

[McNair J. Cannot the charterer say "The Wheat Board "failed to supply me and therefore I was prevented by force "majeure?"]

That would simply be a failure to provide cargo. The charterer must show that the supplier was prevented by an exception. The policy decision of the Canadian Wheat Board not to load these tramps does not come within the exceptions clause. The charterers could have loaded at two working elevators, and, if "strike" is to be relied on, nothing short of total closure is enough. The failure was that of the supplier who was the agent of the charterer. There is no difference in principle between wars, strikes and other obstructions: see, e.g., *Dahl* v. *Nelson, Donkin & Co.*[1] [Reference was made to *Dawson Line* v. *Aktiengesellschaft Adler für Chemische Industrie of Berlin*[2] and Scrutton on Charterparties, 16th ed., p. 152, n. (*k*), and p. 263.] The Wheat Board exercises control through its ownership of the wheat and not through controlling the berths. "Force majeure" cannot be relied on in the case of a sub-contractor. [*Board of Trade* v. *Temperley S.S. Co.*[3] was referred to.] Force majeure must be wholly unexpected and beyond the control of the parties, and it cannot avail the defendants who ordered the vessels to Vancouver after the strike. More wheat was loaded into other ships during the strike than was needed for these five ships, and it was never impossible to load this cargo. The Wheat Board, who were the charterers' agents, could control the delay; therefore this was not delay caused by "any other hindrance . . . "beyond the charterers' control." Reliance is placed on *In re Richardsons & Samuel (M.) & Co.*[4] and *Central Argentine Railway Ltd.* v. *Marwood.*[5] It is not submitted that the Wheat Board's decision was unreasonable, but that the Ministry should have attempted to get it altered.

The second point of law is whether, if the first submission is wrong, the Ministry of Food was under an obligation to supply alternative part or whole cargoes of flour or barley. It is plain

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[1] (1881) 6 App.Cas. 38.

[2] [1932] 1 K.B. 433.

[3] (1927) 27 Ll.L.Rep. 230.

[4] [1898] 1 Q.B. 261; 14 T.L.R. 5.

[5] [1915] A.C. 981.

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that on the authorities as they stand the Ministry (assuming that the alternative cargo point is correct) was under a duty to load an alternative cargo in their three ships once they were delayed in the supply of wheat. The *Riverton* and *Cape Rodney* should have been prepared for alternative cargoes straight away at Vancouver because they were ordered there by the Ministry over a month after the strike had begun. If the question were free from authority, there are three possible views of the law: where the charterparty provides alternatives, the exceptions clause gives (i) no protection; (ii) absolute protection; (iii) protection only for the limited period necessary to load an alternative cargo. The House of Lords has never finally determined which view is right. The first commended itself to Rowlatt J. in *Owners of Steamships Ardgowan, Ardgoil and Buranda* v. *Royal Commission on Wheat Supplies*,[6] and it was also accepted by Bailhache J. in *Brightman & Co.* v. *Bunge y Born Limitada Sociedad.*[7] The Court of Appeal in that case preferred (iii),[8] but the point was not argued in the House of Lords. The decision in *Brightman's* case was applied and followed in *South African Dispatch Line* v. *S.S. Niki (Owners).*[9] [The House of Lords record of *Brightman's* case was referred to.]

It is submitted that *Brightman's* case [10] applies here and, if that is right, there is no defence in the case of the *Riverton* provided it can be shown (as it is submitted is shown by the evidence) that flour was available. The only question then is whether any latitude should be allowed. The moment it becomes apparent to a well-informed person that a strike may last for more than a very short period he must make arrangements accordingly. No reasonable person appreciating the facts of this strike could have formed the view that it could have collapsed at any time: see *Brightman's* case.[10] [Reference was made to *Matheos (Owners)* v. *Louis Dreyfus & Co.*[11] and *Tennants (Lancashire) Ltd.* v. *C. S. Wilson & Co. Ltd.*[12]] This is not a case in which it has been shown that there was enough flour to load some but not all the ships. It has not been suggested that a charterer who cannot load all the ships is excused in respect of the last ship in the line. [Reference was made to *Charles H. Windschuegl Ltd.* v. *Alexander Pickering & Co. Ltd.*[13] and *Bakubhai & Ambalal*

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[6] (1923) 15 Ll.L.Rep. 81.

[7] [1924] 2 K.B. 619.

[8] Ibid.

[9] [1959] 1 Q.B. 238; [1958] 3 W.L.R. 718; [1958] 3 All E.R. 590.

[10] [1924] 2 K.B. 619.

[11] [1925] A.C. 654; 41 T.L.R. 393.

[12] [1917] A.C. 495.

[13] (1950) 84 Ll.L.Rep. 89.

Ltd. v. *South Australian Farmers' Co-operative Union Ltd. of Adelaide.*[14]]

The third point is whether, further or alternatively to the second point, even if the charterers were prima facie within the exceptions, they were nevertheless bound to send the vessels to alternative Canadian or American ports. This applies to all the ships, but is not as potent in respect of the *Moderator*, which will be left out of consideration in the argument. There was a duty to order the ships to an alternative port. One cannot do nothing and let an expected peril run; one must try to mitigate. The broad proposition is that the position in relation to ports is the same as in relation to cargo. Similarly, if the port nominated is not or ceases to be available, the charterer must switch and nominate another; he cannot sit back and leave the charterparty to be frustrated. Reliance is placed on *The Teutonia*,[15] which shows that a bill of lading holder can name a fresh port if the first becomes impossible. He must then nominate another port; if he does not the ship can go to another port and discharge there and earn her freight. If the charterer names an unsafe port the owner may ask for another port or go to an alternative port within the charterparty range. [Reference was made to *Waugh* v. *Morris*[16]; *Nelson* v. *Dahl*[17]; *Tharsis Sulphur and Copper Co.* v. *Morel Bros. & Co.*[18]; *A/S Olivebank* v. *Danck Svovlsyre and Supherphosphat Fabrik*[19]; *Lewis* v. *Louis Dreyfus & Co.*[20]; *Hindley & Co.* v. *General Fibre Co.*[21]; *Pound (A. V.) & Co. Ltd.* v. *M. W. Hardy & Co. Inc.*[22]]

The position on the authorities shows four things: (i) it is always a question of construction or implication what is the extent of the charterer's duty; (ii) a charterer cannot without breach nominate an unsafe or "permanently" obstructed port (as defined in *Nelson* v. *Dahl*[23]); (iii) the charterer must nominate a port which is a reasonably fit port for the purpose of enabling the vessel to perform its part of the contract; (iv) if after nomination the port nominated becomes closed, the charterer must nominate another, and he cannot rely upon his failure to do so

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[14] (1941) 69 Ll.L.Rep. 138.

[15] (1872) L.R. 4 P.C. 171.

[16] (1873) L.R. 8 Q.B. 202.

[17] (1879) 12 Ch.D. 568; sub nom. *Dahl* v. *Nelson, Donkin & Co.* (1881) 6 App.Cas. 38.

[18] [1891] 2 Q.B. 647.

[19] [1919] 1 K.B. 388; [1919] 2 K.B. 162 (C.A.).

[20] (1926) 31 Com.Cas. 239.

[21] [1940] 2 K.B. 517; 56 T.L.R. 904; 67 Ll.L.Rep. 272.

[22] [1956] A.C. 588; [1956] 2 W.L.R. 683; [1956] 1 All E.R. 639.

[23] 12 Ch.D. 568.

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to deprive the owner of his rights under the charterparty. [Reference was also made to *Grace (G. W.) & Co.* v. *General Steam Navigation Co.*,[24] *S.S. Knutsford Ltd.* v. *Tillmanns & Co.*[25] and *Compania Naviera Maropan S/A* v. *Bowaters Lloyd Pulp and Paper Mills.*[26]]

The submission is that there is no reason why delay by strike does not come within exactly the same principle as delay by unsafety, war or blockade, and it is simply a question in each case of assessing the nature and character of the cause of delay and seeing on which side of the line it falls. In this case it falls well on the side of inordinate delay of quite indefinite duration, and in such a case the charterer becomes under the obligation to nominate an alternative port. [Counsel referred to *Braemount S.S. Co. Ltd.* v. *Andrew Weir & Co.*[27]; *Hirji Mulji* v. *Cheong Yue Steamship Co. Ltd.*[28]; *Ropner* v. *Ronnebeck*[29]; *Metropolitan Water Board* v. *Dick Kerr & Co. Ltd.*[30]; *The Penelope*[31]; *Bulman and Dickson* v. *Fenwick & Co.*[32]; *South African Dispatch Line* v. *Panamanian S.S. Niki (Owners).*[33]]

The fourth point is (a) whether in any event the charterers could rely on the exception of strikes when they ordered the vessels to a strike-bound port or chartered the vessels when a strike was in force; (b) whether it was a breach in any event to order the vessels to Vancouver (it being a strike-bound port), independently of the duty to name an alternative port. The first, (a), is a puzzling and difficult point, and the authorities are in a chaotic state. The problem is whether one can rely on an exceptions clause when it must always operate and is not a supervening event. It is submitted that the charterers cannot rely on the exceptions clause in those circumstances. [Reference was made to Scrutton on Charterparties, 16th ed., p. 246, and 10th ed., p. 236, footnote (*r*).] There are five cases directly on the point, and others on the fringes: *France Fenwick & Co.* v. *Spackman (Philip) & Sons*[34]; *Ciampa* v. *British India S.N. Co. Ltd.*[35]; *Taylor* v. *John Lewis Ltd.*[36]; *Safadi* v. *Western Assurance*[37];

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[24] [1950] 2 K.B. 383; 66 T.L.R. (Pt. 1) 147; [1950] 1 All E.R. 201.

[25] [1908] 2 K.B. 385; [1908] A.C. 406; 24 T.L.R. 786.

[26] [1955] 2 Q.B. 68; [1954] 3 W.L.R. 894; [1955] 2 W.L.R. 998.

[27] (1910) 26 T.L.R. 248; 15 Com. Cas. 101.

[28] [1926] A.C. 497; 42 T.L.R. 359.

[29] (1914) 20 Com.Cas. 95; 112 L.T. 723.

[30] [1917] 2 K.B. 1.

[31] [1928] P. 180; 44 T.L.R. 597.

[32] [1894] 1 Q.B. 179; 10 T.L.R. 45.

[33] [1959] 1 Q.B. 238.

[34] (1912) 18 Com.Cas. 52.

[35] [1915] 2 K.B. 774.

[36] 1927 S.C. 891.

[37] (1933) 46 Ll.L.Rep. 140.

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S.S. Induna v. *British Phosphate Commissioners*[38]; *A/S Olivebank* v. *Danck Svovlsyre and Supherphosphat Fabrik*[39]; *Maritime National Fish* v. *Ocean Trawlers*,[40] and *New Zealand Shipping Co. Ltd.* v. *Société des Ateliers et Chantiers de France*.[41] The "*Ciampa* point" (that the charterer should not have nominated Vancouver, thus putting the vessels in the grip of a restraint), applies to all vessels except the *Queen City*.

On (b), it is submitted that it is a breach to order a vessel to a strike-bound port, as it is bound to subject it to inordinate delay. Just as a port must be safe within a reasonable time, so it must be fit within a reasonable time: see *Ogden* v. *Graham*[42] and *The Aello*.[43] The vessels should have been ordered away from Vancouver.

The fifth point, which is limited in its application to the *Moderator*, is whether the failure of the charterers to have cargo available prevented her from getting a berth so as to entitle her by way of damages to the demurrage she would have got had she been an arrived ship. It cannot be contended in this court that the vessel was an arrived ship before she got to the berth. The shipowners rely on *The Aello*[43] and contend that the charterers were at fault in not having a cargo available, thus preventing the ship from getting into berth. This was the result of the Wheat Board's policy, on which the defendants cannot rely. The plaintiffs claim independently that Saturday is a working day. [Reference was made to *Ardan Steamship Co.* v. *Andrew Weir & Co.*[44] and *Central Argentine Railway Ltd.* v. *Marwood*.[45]]

The last points relate to *Alvion Steamship Corporation* v. *Galban Lobo Trading Co. S.A. of Havana*[46]—treatment of Saturdays and reversibility. They arise in an acute form in relation to the *Moderator*. In *Alvion Steamship Corporation* v. *Galban Lobo Trading Co. S.A. of Havana*[46] it was held that a "working "day" was a length of time consisting of a number of hours which according to the custom of the port were usually worked at the port, and the word "weather" qualified it. The problem is: (i) Whether a Saturday at Vancouver counts at all as lay-time; (ii) If it does, does it count as a whole or half day? (iii) Does Saturday at East London count as a whole or half day? (iv) What is the effect of the carry-over of fractions when time is reversible?

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[38] [1949] 2 K.B. 430.

[39] [1919] 1 K.B. 388; [1919] 2 K.B. 162 (C.A.).

[40] [1935] A.C. 524.

[41] [1919] A.C. 1; 34 T.L.R. 400.

[42] (1861) 1 B. & S. 773.

[43] [1958] 2 Q.B. 385.

[44] [1905] A.C. 501.

[45] [1915] A.C. 981.

[46] [1955] 1 Q.B. 430.

The point of law on (ii) and (iii) is the same but arises on different facts. The elevator men worked a 5-day, 40-hour week, the longshoremen a 5½-day, 44-hour week. For flour the elevator men would not be needed. Saturday, it is submitted, in the absence of an express exception counts as a whole day or, failing that, a half day. It is established that in the ordinary way Saturday is not a holiday (*Robert Dollar & Co.* v. *Blood, Holman & Co.*[47]), and it is not a holiday merely because it is outside the 40-hour week, in which case the men merely get more pay: *"Z" Steamship Co. Ltd.* v. *Amtorg New York.*[48] If it is not a holiday, it is an ordinary working day. In the *Alvion* case[49] Saturday afternoons were expressly excepted, and Saturday mornings were therefore counted as four hours. A Saturday must count as something.

A. A. Mocatta Q.C. and *Michael Kerr* for the charterers. The defendants' argument falls into seven chapters, the first three (which will be dealt with substantially as one) being: (i) Were they, as alleged, in breach in any of the five cases in nominating Vancouver? (ii) Did they, by ordering or nominating Vancouver, give any warranty of fitness thereby? (iii) Should they in any of these cases have given a second nomination? The answer to all these questions is no. The submissions can be divided into four parts: (a) What do the cases decide as to the fetters, if any, on the option given to the charterers as regards their choice between alternative ports and places of loading? It is submitted that there is no relevant fetter on that choice. (b) How have the courts dealt with strikes in connection with ports and frustration? A distinction must be drawn in going through the cases between the doctrine of frustration whereby a contract is dissolved leaving the parties free with no claims against one another (which does not arise in this case) and cases in which the courts have decided that a very long delay would frustrate the object of the adventure and accordingly have said that a particular person can without waiting further hold the other party as being in breach. (c) Was there anything special about this strike on the facts to alter the well-established approach of the courts to strikes? (d) Is there any difference as regards time as between one of these ships and another?

It is submitted first that for present purposes one can disregard any fetter imposed by the word "safe" in clause 14. A

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[47] (1920) 4 Ll.L.Rep. 343.

[48] (1938) 61 Ll.L.Rep. 97; 54 T.L.R. 849.

[49] [1955] 1 Q.B. 430.

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charterer with a selection of loading ports or places to choose from is, in the absence of any express words, entitled in making a choice to disregard the convenience of the shipowner, subject only to two possible exceptions—that the port chosen must not be unsafe or more than temporarily unsafe when the vessel is ordered there or (possibly) when at or about to enter the port (if the contract provides on its true construction that the port must be safe), and that it must not be impossible for the ship to get into the port or place or load or discharge at the port or place, and the test of impossibility (whether physical, legal or possibly mere delay) is that the obstacle, impediment or prohibition must not be of so long duration as to defeat the commercial object of the venture.

It is submitted secondly that, once a valid choice has been made, it is as if the nominated port or place had been written into the charter from the date of the charter. Accordingly, once the choice is properly made, any relevant exceptions clauses in the charter apply to the place chosen and excuse the charterers. The difference between ports and cargoes (apart from express words) is that there is an election as to ports but not as to cargoes. There is no right to switch from port to port, but there may be a right to switch cargoes, which does not involve the ship. [Reference was made to *The Aello*,[50] *The Niki*[51] and *Tharsis Sulphur and Copper Co.* v. *Morel Bros. & Co.*[52]] There is no case showing that once a good nomination has been made one is under a duty to make another. If the first was not good and one makes no nomination, this is a breach of contract, and *The Teutonia*[53] did not decide otherwise. Reliance is placed on *The Niki*.[54] If there was no breach by the charterers in ordering to Vancouver, they have no right or obligation to substitute another port as a result of a subsequent event.

The Teutonia[55] did not decide that there was a duty on the charterers to make a fresh nomination once an original good nomination had become unsafe. If that is right, it is sufficient for the charterers. There is an alternative view (adopted in Scrutton on Charterparties) that establishes that a port must not only be safe when the original order is made but also when a ship gets there (subject to quite temporary unsafety). *St. Enoch Shipping Co. Ltd.* v. *Phosphate Mining Co.*[56] shows no

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[50] [1958] 2 Q.B. 385.
[51] [1959] 1 Q.B. 238.
[52] [1891] 2 Q.B. 647.
[53] L.R. 4 P.C. 171.
[54] [1959] 1 Q.B. 238.
[55] L.R. 4 P.C. 171.
[56] [1916] 2 K.B. 624.

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obligation to name another port. *Hindley & Co.* v. *General Fibre Co.*[57] was a case where the nomination was bad from the start. [Counsel referred to *Pound (A. V.) & Co. Ltd.* v. *M. W. Hardy & Co. Inc.*[58]; *Carapanayoti & Co.* v. *E. T. Green Ltd.*[59]; *Compania Naviera Maropan S/A* v. *Bowaters Lloyd Pulp and Paper Mills* [60]; *Tharsis Sulphur and Copper Co.* v. *Morel Bros. & Co.*[61]; *Bulman and Dickson* v. *Fenwick & Co.*[62]; *Dobell & Co.* v. *Green & Co.*[63]; *Matheos (Owners)* v. *Louis Dreyfus & Co.*[64]; *Ogden* v. *Graham* [65]; *Grace (G. W.) & Co.* v. *General Steam Navigation Co.*[66]; *S.S. Knutsford Ltd.* v. *Tillmanns & Co.*[67]; *Metcalfe* v. *Britannia Ironworks Co.*[68]; *Akt. Eriksen and Andersen's Rederi* v. *Foy, Morgan & Co.*[69]] Temporary obstacles do not make a port unsafe or enable a shipowner to rely on *Dahl* v. *Nelson, Donkin & Co.*[70] The relevance of that case is the light that it offers on the test as to when something becomes commercially impossible: see McNair's Legal Effects of War, p. 153. *A/S Olivebank* v. *Dansk Svovlsyre and Supherphosphat Fabrik* [71] was a case of a nugatory nomination of an impossible port. [Reference was made to *Inverkip S.S. Co.* v. *Bunge & Co.*[72] and *Universal Cargo Carriers Corporation* v. *Citati.*[73]]

It has to be decided what length of time is necessary to constitute commercial impossibility, or to be equal to the word "permanent," and the answer is such a period of time as frustrates the commercial object of the venture: *Dahl* v. *Nelson, Donkin & Co.*[74]; *Stanton* v. *Richardson* [75]; *Inverkip S.S. Co.* v. *Bunge & Co.*[76]; *Universal Cargo Carriers Corporation* v. *Citati.*[77] The law is consistent throughout. The owners may have waived a breach by allowing the vessel to go to Vancouver. It is impossible for someone to say that an order is nugatory and then proceed to comply with it.

The second chapter raises the point that there is no warranty of fitness in ordering the vessel to Vancouver. This is not an independent point and no authorities support the plaintiffs' claims under it.

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[57] [1940] 2 K.B. 517.

[58] [1956] A.C. 588.

[59] [1959] 1 Q.B. 131; [1958] 3 W.L.R. 390; [1958] 3 All E.R. 115.

[60] [1955] 2 Q.B. 68; [1954] 3 W.L.R. 894; [1955] 2 W.L.R. 998.

[61] [1891] 2 Q.B. 647.

[62] [1894] 1 Q.B. 179.

[63] [1900] 1 Q.B. 526; 5 Com.Cas. 161.

[64] [1925] A.C. 654.

[65] 1 B. & S. 773.

[66] [1950] 2 K.B. 383.

[67] [1908] 2 K.B. 385.

[68] (1877) 2 Q.B.D. 423; 46 L.J. Q.B. 443; 36 L.T. 451.

[69] (1926) 25 Ll.L.Rep. 442.

[70] 6 App.Cas. 38.

[71] [1919] 1 K.B. 388.

[72] [1917] 2 K.B. 193, C.A.

[73] [1957] 2 Q.B. 401; [1957] 2 W.L.R. 714; [1957] 2 All E.R. 70.

[74] 6 App.Cas. 38.

[75] (1872) L.R. 7 C.P. 421.

[76] [1917] 2 K.B. 193, C.A.

[77] [1957] 2 Q.B. 401.

The third chapter, dealing with the point that there is no breach in not ordering to a new port, is vital. The authorities lead inevitably to the conclusion that a second nomination should not be made. [Reference was made to *Tapscott* v. *Balfour* [78]; *Tharsis Sulphur and Copper Co.* v. *Morel Bros. & Co.*[79]; *Leonis S.S. Co.* v. *Rank Ltd.*[80]; *Anglo-Danubian Transport Co. Ltd.* v. *Ministry of Food.*[81]]

[McNAIR J. *The Teutonia* [82] was a decision under the law of Admiralty. Whatever may be the position now, the Courts of Admiralty were not then bound by the decisions of the common law courts, and the Courts of Admiralty were less rigid than the common law courts. By the law of Admiralty, as distinguished from the common law, hardship is taken into account and the cases are decided under the general principles of jurisprudence derived from a great variety of sources in order to reach an equitable result. This was before the fusion of law and equity. I suggest that is an explanation of the freight point in *The Teutonia.*[82] The decision is not arrived at by the common law way but by the direct application of the general principles of jurisprudence.]

It is important to see how the courts have dealt with strikes. On the basis of *Universal Cargo Carriers Corporation* v. *Citati* [83] the same yardstick is used for measuring delay when seeking to ascertain on the one hand whether a contract is dissolved by frustration or, on the other hand, whether the party has been in breach of an obligation or has been in breach for a long time. Because the yardstick is the same the cases about strikes are relevant. All the cases dealing with strikes have been referred to except *Bank Line* v. *Capel (A.) & Co.*,[84] in which Lord Sumner set out the tests to be applied. The courts have never treated a strike as being a frustrating event. [Reference was made to *Bulman and Dickson* v. *Fenwick & Co.*[85]; *Dobell & Co.* v. *Green & Co.*[86]; *Braemount S.S. Co. Ltd.* v. *Andrew Weir & Co.*[87]] There is no case other than *The Penelope* [88] where at the beginning of a strike a party has said " my contract has been frustrated

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[78] (1872) L.R. 8 C.P. 46.

[79] [1891] 2 Q.B. 647.

[80] [1908] 1 K.B. 499; 24 T.L.R. 128.

[81] (1949) 65 T.L.R. 762; [1949] 2 All E.R. 1068; 83 Ll.L.Rep. 137.

[82] L.R. 4 P.C. 171.

[83] [1957] 2 Q.B. 401.

[84] [1919] A.C. 435; 35 T.L.R. 150, H.L.

[85] [1894] 1 Q.B. 179.

[86] [1900] 1 Q.B. 526.

[87] 26 T.L.R. 248.

[88] [1928] P. 180.

"by a strike" and the courts have said that that was so. [Counsel referred to *Ropner* v. *Ronnebeck*[89] and *Metropolitan Water Board* v. *Dick Kerr & Co. Ltd.*[90]] There is a presumption in the case of a war that it is going to last for a very long time. Of a strike the same cannot be said. In this case nobody is arguing that the contract was frustrated. The courts take one view as regards war and another as regards strikes, and there is a very sensible distinction. [Counsel referred to *Dahl* v. *Nelson, Donkin & Co.*[91]; *The Penelope*[92]; *South African Dispatch Line* v. *Panamanian S.S. Niki (Owners)*[93]; McNair's Legal Effects of War, pp. 161 and 165, and Scrutton on Charterparties, p. 113, note (*a*).]

The facts in relation to this strike show that there was no background of embitterment. It turned out to be an unusually long strike for that part of the world, but it did not differ in kind from other strikes. At the time the order to Vancouver was given, a reasonable man in the position of the charterers or owners would not have come to the conclusion that the strike was likely to last so long that the subsequent performance of the contract after the strike would amount to the performance of a new contract. [Counsel referred to *Hirji Mulji* v. *Cheong Yue Steamship Co. Ltd.*[94]]

The fourth chapter raises the point whether, having got to Vancouver, the charterers (apart from the option for alternative cargoes in the three Ministry cases) were disentitled from relying on the exceptions clause. They were not, and they rely on the words "force majeure, strikes and hindrances of whatsoever "nature beyond [their] control." On the question whether they were disentitled as a matter of law because of the *Ciampa*[95] series of authorities, it is submitted that the cases lay down no such principle as that contended for by the plaintiffs. If there is such a principle it only applies to events known to be in operation at the date of the contract, which is the charterparty. Therefore it could only apply to the *Agostini Bertani* and conceivably the *Moderator*. It is submitted also that the principle can have no application to strikes or the consequences of strikes, because, unlike the French law in the *Ciampa* case,[95] they may end at any time and the ship is not "doomed" to suffer the peril. [Counsel referred to *Dobell & Co.* v. *Green & Co.*[96]; *The Don*

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[89] 20 Com.Cas. 95.

[90] [1917] 2 K.B. 1.

[91] 6 App.Cas. 38.

[92] [1928] P. 180.

[93] [1959] 1 Q.B. 238.

[94] [1926] A.C. 497.

[95] [1915] 2 K.B. 774.

[96] [1900] 1 Q.B. 526.

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Francisco [97]; *The Gaetamo and Maria* [98]; *Wells* v. *Gas Float Whitton No. 2 (Owners)* [99]; *The Teutonia* [100]; *Leonis S.S. Co. Ltd.* v. *Joseph Rank Ltd. (No. 2)* [101]; *France Fenwick & Co.* v. *Spackman (Philip) & Sons* [102]; *Naamlooze Vennootschap A.C. Lensens Stoomvaart/Maatschappij* v. *Muller & Co. (London) Ltd.*[103]; *Mitsubishi Shoji Kaisha Ltd.* v. *S. Soskin & Co. Ltd.*[104]; *Taylor* v. *John Lewis Ltd.*[105]; *Safadi* v. *Western Assurance* [106]; *S.S. Induna* v. *British Phosphates Commissioners* [107]; *South African Dispatch Line* v. *S.S. Niki (Owners)* [108]; *Matheos (Owners)* v. *Louis Dreyfus & Co.*[109]; *Lewis* v. *Louis Dreyfus & Co.*[110]; *A/S Olivebank* v. *Danck Svovlsyre and Supherphosphat Fabrik.*[111]]

[*Roskill Q.C.* referred additionally to *Brauer & Co. (Great Britain)* v. *James Clark (Brush Materials).*[112]]

On the question whether the charterers were disentitled from relying on the exceptions clause because the Canadian Wheat Board were their agents, the charterers place reliance on "hindrance." Were the Canadian Wheat Board the charterers' agents? It is submitted that (i) if the Ministry and the Wheat Board are identified, there was nevertheless a strike and a hindrance affecting both, and neither was able to act voluntarily; (ii) alternatively, the Wheat Board's method of dealing with the situation and their decisions caused a delay to the charterers (within the meaning of strike or hindrance); (iii) that point remains good despite the agency argument (a) because of the capacities of the Board as a statutory authority regarding allotment of grain and also as the de facto authority dealing with the allotment of berths; and (b) because if it was unreasonable for the Board to act other than as they did, that is a hindrance; (iv) if those points are right, it is impossible to say that these five ships should have been given preferential treatment, and the question of quantum would have to be considered.

Cases on hindrance show how wide this exception is, and also that the courts do not expect a party to disregard all other persons in the interests of the plaintiffs: see *Tennants (Lancashire) Ltd.*

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[97] (1861) Lush. 468.

[98] (1882) 7 P.D. 137.

[99] [1897] A.C. 337; 13 T.L.R. 422.

[100] L.R. 4 P.C. 171.

[101] (1908) 13 Com.Cas. 295.

[102] 18 Com.Cas. 52.

[103] (1921) 7 Ll.L.Rep. 248.

[104] (1925) 23 Ll.L.Rep. 198.

[105] 1927 S.C. 891.

[106] 46 Ll.L.Rep. 140.

[107] [1949] 2 K.B. 430.

[108] [1959] 1 Q.B. 238.

[109] [1925] A.C. 654.

[110] 31 Com.Cas. 239.

[111] [1919] 1 K.B. 388.

[112] [1952] W.N. 422; [1952] 2 T.L.R. 349; [1952] 2 All E.R. 497, C.A.

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Cape of Good Hope Motor Ship Co. Ltd. *v.* Same.

Miramar Compania Naviera S.A. *v.* Government of the Union of South Africa.

v. *C. S. Wilson & Co. Ltd.*[113]; *Crawford and Rowat* v. *Wilson, Sons & Co.*[114]; *Phosphate Mining Co.* v. *Rankin, Gilmour & Co.*[115]; *Scheepvaart Maatschappij Gylsen* v. *North African Coaling Co.*[116]; *Matsoukis* v. *Priestman & Co.*[117]

The Wheat Board's action was admittedly reasonable as regards the port. What they did as regards berths they did because they were the grain-controlling authorities. Their statutory powers were conferred by the Canadian Wheat Board Act, 1935. Their policy undoubtedly caused a delay to the charterers in loading tramps, which amounted to a hindrance beyond the charterers' control. The Board's policy was patently reasonable and was caused by the strike. They were not just the charterers' agents to ship, but were a statutory authority with governmental functions. The result of the plaintiffs' argument would be that the charterers would be in a worse position because they bought from the Board than if they bought from some private concern. There can be no obligation in law on the charterers to persuade the Board to do something which was unreasonable, i.e., to prefer the individual or to treat tramps and liners together in order of tender or arrival. It is submitted that: (i) what the Board did was the natural sequela of the strike; (ii) it was reasonable; (iii) what the plaintiffs say should have been done would have been unreasonable. [Reference was made to *Stewart (J.) & Co.* v. *Rank (J.) Ltd.*[118]; *Board of Trade* v. *Temperley S.S. Co.*[119]; *William Cory & Son Ltd.* v. *London Corporation*[120]; *Watson* v. *Borner (H.) & Co. Ltd.*[121]; *Ogmore S.S. Co.* v. *Borner*[122]; *In re Richardsons & Samuel (M.) & Co.*[123]; *Larsen* v. *Sylvester & Co.*[124]]

Central Argentine Railway Ltd. v. *Marwood*[125] has no relevance to the argument on hindrances: as regards strikes, it is submitted that it should be treated as a case decided on its own special points: cf. *Leonis S.S. Co. Ltd.* v. *Joseph Rank Ltd. (No. 2).*[126] [Reference was made to Scrutton on Charterparties, 16th ed., p. 264, note (*o*).] To what extent is *Central Argentine Railway Ltd.* v. *Marwood*[127] a binding authority on the word

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[113] [1917] A.C. 495.

[114] (1896) 12 T.L.R. 170; 1 Com. Cas. 154, 277 (C.A.).

[115] (1916) 21 Com.Cas. 248.

[116] (1916) 85 L.J.K.B. 1386.

[117] [1915] 1 K.B. 681.

[118] (1920) 36 T.L.R. 728.

[119] 27 Ll.L.Rep. 230.

[120] [1951] 2 K.B. 476; [1951] 2 T.L.R. 174; [1951] 2 All E.R. 85; 66 T.L.R. (Pt. 2) 265.

[121] (1900) 16 T.L.R. 524; 5 Com. Cas. 377, C.A.

[122] (1901) 6 Com.Cas. 104.

[123] [1898] 1 Q.B. 261; 14 T.L.R. 5.

[124] [1908] A.C. 295.

[125] [1915] A.C. 981.

[126] 13 Com.Cas. 295.

[127] [1917] A.C. 981.

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" strike "? To the extent that the decision in the House of Lords was based upon the presence of the words " whether " in berth or not " it has no application to the South African charterparties. It is not relevant to the present case, where the words are " lay or working days shall not count at ports of loading " during any time when the loading of the cargo is delayed by " strikes." In that case they were " In case of strikes . . . such " time is not to count." The wording of this clause undoubtedly covers delay in loading by strikes indirectly affecting the ship because it prevents the ship in front from being loaded. The *Central Argentine* case [127] neither bars the charterers from relying on strikes nor from relying on " hindrances of whatsoever kind " or nature beyond [their] control." [Counsel referred to *Tabb and Burletson* v. *Briton Ferry Works Ltd.*[128]]

Chapter five relates to the effect of the alternative cargo option in the three Ministry of Food cases. It is submitted that as a matter of construction these options do not oblige the charterers to load either barley or flour. This case is not covered by *Brightman & Co.* v. *Bunge y Born Limitada Sociedad* [129] and is also distinguishable from *South African Dispatch Line* v. *S.S. Niki* (*Owners*),[130] because of the different language used. Alternatively, it is submitted that there is only an obligation to load an alternative cargo where the obstacle to load the intended cargo amounted to an impossibility, and that there is no such obligation where the obstacle is something temporary like a strike. If the *Brightman* principle is capable of applying, it does not apply to the facts here. It is clear that once one names a port it is as if written in originally and one cannot change it, and unless a change by the charterer is causing the shipowner unnecessary expense, with ordinary options a charterer can change from day to day until he has completed the loading of the ship. *Brightman's* case [131] is explicable on the grounds that where there are alternative modes of performance and the chosen one becomes impossible because of illegality, etc., one must choose another. *Lewis* v. *Louis Dreyfus & Co.*[132] is relied on in relation to alternative cargo. It has no relevance to the alternative port point.

The difference between election and selection was recognised by Devlin J. in *S.A. Maritime et Commerciale of Geneva* v.

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[127] [1917] A.C. 981.
[128] (1921) 6 Ll.L.Rep. 181.
[129] [1924] 2 K.B. 619.
[130] [1959] 1 Q.B. 238.
[131] [1924] 2 K.B. 619.
[132] 31 Com.Cas. 239.

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Anglo-Iranian Oil Co. Ltd.[133] (see also Carver's Carriage of Goods by Sea, 10th ed., pp. 436–437).

If the preceding arguments on chapter five are wrong, it is submitted that the onus is upon the plaintiffs to establish that the defendants would have achieved any saving of time by attempting to exercise the option or that they could have exercised it at all. Reliance is placed on *Matheos (Owners)* v. *Louis Dreyfus & Co.*[134] The two cases relied on by the plaintiffs on this point are irrelevant: *Bakubhai & Ambalal Ltd.* v. *South Australian Farmers' Co-operative Union Ltd. of Adelaide*[135] and *Windschuegl* v. *Pickering.*[136] [Reference was made to Scrutton on Charter-parties, 16th ed., p. 152, notes (*b*) and (*n*), and pp. 154, 273, 283 and 486 on onus of proof.]

Even if the charterers are wrong so far, it is submitted that as regards the *Queen City* and *Cape Rodney* they would not have been able to ship a complete cargo if they had first loaded a part cargo of optional grain or flour. The only effect might have been that it might have lessened by a few days the time which those ships were retained at Vancouver, as after the strike there would not have been a whole ship to load. In each case if the charterers were obliged to exercise their option as to alternative cargoes they were entitled to a reasonable time to make up their minds and to make arrangements. In some cases it would not have benefited the ships at all. The *Riverton* is to some extent sui generis because it contained the option of a full cargo of flour. [Counsel referred to *South African Dispatch Line* v. *S.S. Niki (Owners)*[137] and *Dobell & Co.* v. *Green & Co.*[138]]

The true view is that one is entitled to order the ship to the port. The charterers are entitled to rely on this exceptions clause to protect them for such time as it would protect a reasonable charterer in their position trying to get an alternative cargo, and they are entitled to have some time to look around and to get the flour. It is only when that time has expired that lay days begin to run again.

"Intended cargo" does not involve appropriation. The cargo in this case was as "intended" as in *Leonis S.S. Co. Ltd.* v. *Joseph Rank Ltd. (No. 2).*[139] The Ministry intended to load wheat and the loading of the intended cargo was delayed by strike.

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[133] [1953] 1 W.L.R. 1379; [1954] 1 W.L.R. 492; [1953] 2 All E.R. 1325; [1954] 1 All E.R. 529.

[134] [1925] A.C. 654.

[135] 69 Ll.L.Rep. 138.

[136] 84 Ll.L.Rep. 89.

[137] [1959] 1 Q.B. 238.

[138] [1900] 1 Q.B. 526.

[139] 13 Com.Cas. 295.

The sixth chapter relates only to the *Moderator*. Did the charterers in breach of contract prevent her from becoming an arrived ship so as to be liable in damages? The answer clearly is "no." There was no berth available, distinguishing this case from *Ardan Steamship Co.* v. *Andrew Weir & Co.*[140] and *The Aello.*[141] The *Moderator* charterparty did not contain the words "whether in berth or not." There are eight uncontroversial facts: (i) the charter was a berth charter, without the words "whether in berth or not"; (ii) the charterparty contained various demurrage clauses (9 and 17); (iii) no question of lay time starting until she got into berth could arise because this was an unqualified berth charter; (iv) time did not count until 24 hours after written notice of readiness was given according to clause 9 of the charter; (v) the charterers accept written notice as having been given as at the time the loading actually started; (vi) it is admitted that as a matter of law the charterers were entitled to 24 hours from the notional giving of notice notwithstanding that the vessel was worked from that time (see *Pteroti Compania Naviera S.A.* v. *National Coal Board*[142]); (vii) the question of when lay time began after that 24 hours depends upon the treatment of Saturdays at Vancouver; (viii)—which is slightly controversial—there can be no possibility of seriously arguing that the charterers were in breach in ordering the vessel to Vancouver in view, inter alia, of the fact that the charter contained a special clause 36, or that she should have been switched elsewhere.

Ardan Steamship Co. v. *Andrew Weir & Co.*[143] and *The Aello*[144] turn on the crucial matter that had cargo been available the ship could have got a place where she would have been an "arrived ship" and time would have begun to run. There is no breach in a charterer nominating a port which happens to be full of shipping so that the ship cannot get into the port as soon as she arrives. One is entitled to choose a berth which is congested just as one is entitled to choose a port which is congested. There is no question that she was delayed because there was no berth. The only oddity in this case is that the person who provides the cargo also nominates the berth: see *Tharsis Sulphur and Copper Co.* v. *Morel Bros. & Co.*[145] Exception of lay time must be read

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[140] [1905] A.C. 501.

[141] [1958] 2 Q.B. 385.

[142] [1958] 1 Q.B. 469; [1958] 2 W.L.R. 505.

[143] [1905] A.C. 501.

[144] [1958] 2 Q.B. 385.

[145] [1891] 2 Q.B. 647.

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as exception on the charterers' duty to provide a cargo: see *Brightman & Co.* v. *Bunge y Born Limitada Sociedad.*[146]

The first question in the seventh chapter is whether Saturday counts at all. It is not whether Saturdays are included in the phrase "Sundays and holidays, etc.," as in *"Z" Steamship Co. Ltd.* v. *Amtorg New York.*[147] It is whether Saturday is a weather working day within *Alvion Steamship Corporation Panama* v. *Galban Lobo Trading Co. S.A. of Havana*[148] and *Robert Dollar & Co.* v. *Blood, Holman & Co.*[149] The facts here are odd in that both the elevator men and longshoremen were necessary to load wheat. The longshoremen work half day Saturdays, the elevator men do not, except at time and a quarter, and do not normally do so. One must only consider as working days the time common to both the essential classes of labourers.

The second point is that if any part of Saturday is a weather working day it must be calculated as four hours, otherwise the charterer gets a different amount of loading time according to the date of commencing to load.

The third point is that the effect of the *Moderator* time sheet and clause 26 is to contract out of the *Alvion Steamship Corporation Panama* v. *Galban Lobo Trading Co. S.A. of Havana*[150] decision. A weather working day is a period of 24 hours running consecutively except where interrupted by (a) Sunday, (b) holiday, (c) noon Saturday to 7.20 the following working day, (d) weather, (e) shifting.

The fourth point is the "reversible" point. It is submitted that there is a pool of time made up of time for loading and time for discharging. One cannot say any time has been saved on loading, because one does not know how long one is going to take on discharge, and one can only say one has saved time after discharge. Per contra one cannot say one has exceeded it until one has used up the whole of one's time and exceeded it. Demurrage or discharge are calculated at the end of the discharging time. [Counsel referred to *Alma S.S. Co. S.A.* v. *V. M. Salgaoncar e Irmaos*[151]; *Love & Stewart Ltd.* v. *Rowtor Steamship Co. Ltd.*[152]; *Verren* v. *Anglo-Dutch Brick Co. (1927) Ltd.*[153]; *"Z"*

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[146] [1924] 2 K.B. 619.
[147] 61 Ll.L.Rep. 97.
[148] [1955] 1 Q.B. 430.
[149] 4 Ll.L.Rep. 343.
[150] [1955] 1 Q.B. 430.
[151] [1954] 2 Q.B. 94.
[152] [1916] 2 A.C. 527.
[153] (1929) 34 Ll.L.Rep. 56; 45 T.L.R. 404.

Steamship Co. Ltd. v. *Amtorg New York*[154]; *Rederiaktiebolaget Transatlantic* v. *Compagnie Française des Phosphates de l'Oceanie*.[155]]

Roskill Q.C. replied.

Cur. adv. vult.

McNAIR J., stating the facts, said that the demurrage claims involved in the ships which were delayed at Vancouver amounted to very large sums, and involved in many cases complicated and difficult issues of fact and law. In addition, on certain views of the facts and law, claims for dispatch money arose. The five selected cases had been tried together in the hope and expectation that the decision in these cases would enable settlement to be reached in other cases, though the selected cases were not strictly test cases. His Lordship proceeded to state the issues argued as follows:

I. The point of widest importance raised by these cases is as to the obligations of the charterers when one of the loading ports becomes strike-bound in the sense that loading cannot be completed within a reasonable time, or without such delay as would frustrate the commercial adventure.

Is the charterer, when, after the date of the charter but before any loading port is nominated, the port he intends to nominate becomes strike-bound, obliged to nominate another port within the range which is not strike-bound? And if after the date of the charter and after a loading port has been nominated that loading port becomes strike-bound after the vessel's arrival there, is the charterer obliged to nominate another loading port within the range which is not strike-bound? Or alternatively, does the charterer by nominating a particular loading port warrant that the nominated port is at the date of nomination or of the vessel's arrival and will remain a loading port which is not strike-bound?

These questions clearly involve, in addition to the difficult problems of law, a close examination of the facts as to the strike and its likely duration at the dates material in the case of each ship.

II. But counsel on behalf of the shipowners, while accepting for the purpose of this branch of his argument that Vancouver was originally and remained a proper loading port, submitted in the forefront of his argument that on the facts and in law the charterers were not protected against claims for demurrage by

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[154] (1938) 61 Ll.L.Rep. 97.

[155] (1926) 32 Com.Cas. 126.

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the exceptions clause in each of the charters, which provides that "lay or working days shall not count at ports of loading during any time when the supply or loading of stiffening, or the supply or bringing by rail, craft or otherwise to the port of loading or alongside the vessel, or the loading of the cargo or intended cargo or any part thereof is delayed by . . . force majeure . . . strikes . . . or any other hindrance of whatsoever nature beyond the charterers' control."

This submission was based on the following cumulative or alternative contentions:

(a) that the charterers are under an absolute obligation (i) to have sufficient cargo alongside the ship to start loading when she gives notice of readiness, and to have made satisfactory arrangements for bringing the balance of the cargo down, and (ii) to load such cargo within the lay days subject to any relevant exception in the exceptions clause;

(b) that clause 31 does not qualify the obligation to provide cargo, but merely takes out from the lay time any time by which the provision of the cargo is delayed or the actual loading is delayed;

(c) that, even if clause 31 is to be regarded as qualifying the obligation to provide cargo, then inasmuch as the charterers elected to fulfil their obligation to provide cargo by contracting with the Canadian Wheat Board, who thus became the agent or contractor of the charterer for fulfilling that obligation, the charterers must show that they and the Canadian Wheat Board were delayed by excepted causes, which they cannot do as the delay was in fact caused by the action of the Board as such agent or contractor for the charterers in giving preference to liners and withholding wheat for full cargoes from tramps;

(d) that, if the action taken in pursuance of the policy decision of the Canadian Wheat Board is to be considered as action taken by the Wheat Board in its official or executive capacity, and not as agent or contractor for the charterers, the charterers cannot rely upon that factor as they took no steps to protest against or obtain a reversal of that policy;

(e) further or alternatively, that inasmuch as it was proved that at all times there was in the non-strike-bound elevators at Vancouver sufficient wheat in bulk to load any particular ship in question, or, I think, all the ships with which I have to deal, the charterers cannot bring themselves within the clause;

(f) that in so far as the charterers rely upon strikes they cannot in the cases when the nomination was made after the strike broke out (or, as in the case of the *Queen City*, after it was known to be a probability) rely upon an exception which must inevitably operate.

III. Furthermore, on the assumption (which was not conceded) that the charterers were initially protected, it was contended that when it became apparent that the shipment of wheat in bulk would become subject to indefinite delay, the charterers were then, or within a reasonable time thereafter, bound to exercise their option to load alternative cargoes, and it was argued that even in those cases, i.e., *Queen City* and *Rodney*, where the option was limited to one-third barley and one-third flour, the exercise of such option would have enabled the ships to be treated as liners so as to fill up with wheat in bulk.

In addition, in all the cases controversy arose as to the proper treatment of Saturday for the purpose of calculating lay days, and as to the proper calculation of the length of "working "days."

IV. In the case of the *Moderator* it was argued on behalf of the ship that, while conceding in this court, and I think in the Court of Appeal, that it was not open to the ship to claim that she became an arrived ship before she actually got into berth, the charterers by their failure to have cargo ready or available at the time of the ship's arrival, had by this breach of contract prevented the ship getting into berth on her arrival.

In summary the argument made on behalf of the charterers ran on the following lines:

I. As to the suggested obligation to nominate a substitute port, and as to the suggested warranty that the nominated port will remain a port in which loading can take place in a reasonable time or within such time as would not frustrate the commercial adventure, it was submitted:

(a) that, there being in the charterparty no express limitation on the right of selection except as to the safety of the loading place at the selected port, the charterer in making his choice of a loading port need not take into account the convenience of the shipowners;

(b) that the only possible implied limitations on the choice were (i) that the port must not be unsafe or more than temporarily unsafe either from political or physical causes at the time when the ship is ordered there or (possibly) when the ship arrives at or is about to arrive at the port if, on its true construction, the contract impliedly provides that the port shall be safe; and

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(ii) that it must not be impossible for the ship to get in and load (or discharge as the case may be), and that the test of impossibility whether physical or legal, is that the obstacle, impediment or prohibition was not likely to be operative so long (or be reasonably anticipated to be of such duration) as to defeat the commercial object of the adventure;

(c) that once a proper nomination has been made the charter is to be construed as if the nominated port had been originally written in as the loading port;

(d) that on the facts here it could not be said with any degree of certainty at any material time that the strike was likely to continue for such length of time as to make the port an "impossible port";

(e) that in the eye of the law strikes, as distinct from war, have always been treated, and rightly treated, as subject to such unexpected termination that they cannot without more be treated as abrogating contracts or involving substituted obligations.

II. It was further submitted on behalf of the charterers:

(a) that there was no settled rule of construction which would disentitle the charterers from relying on the exception of strikes merely because the strike was in existence or about to begin when the material nomination was made;

(b) that if (contrary to the charterers' contention) the Canadian Wheat Board was the agent of the charterers, and its decision not to make wheat available to the charterers for the loading of full cargoes was an act for which the charterers were in law responsible, both the Board and the charterers were delayed in providing the cargoes by strikes, but

(c) that in fact the decision of the Canadian Wheat Board to withhold wheat for bulk cargoes for tramps and to give liners preference was an act taken by them in their executive capacity on behalf of Her Majesty in right of Canada, and as such was from the charterers' point of view within the expression "force "majeure . . . or any other hindrance whatsoever beyond the "charterers' control," and that as such policy was reasonable in the circumstances, the charterers were not debarred from relying upon it by reason of the fact that they did not protest against it and seek its reversal;

(d) that the fact that there was at all material times in the non-strike-bound elevators at the port wheat sufficient to load a particular ship, does not debar the charterer from relying upon the exceptionally wide exceptions in the charterparties concerned.

III. As to the suggested obligation to ship alternative cargoes at Vancouver, it was submitted:

(a) that, it being established that, in fact, the charterers intended to ship wheat in bulk, the presence in the exceptions clause of the words "the cargo" as well as the words "intended "cargo" prevented the obligation attaching;

(b) that the onus lay upon the shipowners to show that substitute cargo was available, and would have secured earlier loading of the vessel, which onus they had not discharged;

(c) that, if on the facts it is shown that substitute cargoes were available, it is not established that the exercise of the one-third options in the case of the *Queen City* and *Cape Rodney* would have enabled the ships to load the balance of their cargoes in bulk wheat any earlier, and that, in any event, before making a decision to switch over to substitute cargoes, the charterers were entitled to have regard in relation to each ship to the strike position as at the date when the decision to switch fell to be taken.

IV. As to the *Moderator*, the main submissions on behalf of the charterers were:

(a) that the original nomination of Vancouver could not be attacked in view of the fact that the vessel arriving on June 6 got into berth on June 12, and that by the charter the risk of normal delay in getting into berth lay on the ship, and

(b) that the failure to get into berth earlier was not caused by any default on the part of the charterers in their arrangements for having cargo available, but by the fact that there were other ships in turn for loading before the *Moderator*.

I am conscious that in this bare outline I may not have done full justice to the arguments of counsel, which extended over some 24 days, and involved reference to just under a hundred reported decisions.

[His Lordship referred to the facts relating to the agreement between the Ministry of Food and the Canadian Wheat Board, and continued:] It was agreed before me that the court need not be concerned with the actual machinery by which the Board made the wheat available to the Ministry through its commercial agents. In effect, individual pro forma contracts for each shipment were made, shortly before the date of the ship's arrival, with these agents. A similar master agreement was entered into between the India Supply Mission and the Board on October 11, 1952, covering 300,000 tons of wheat to be shipped from Pacific Coast ports over the months January to July, 1953, and a similar

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master agreement was entered into between the South African Wheat Board and the Board for the supply of 150,000 tons of wheat to be shipped from Pacific Coast ports over the months of January to July, 1953.

I am satisfied that in these agreements the respective charterers made reasonable and proper arrangements for securing the delivery of the cargoes to the ships in due time and it was not disputed that the quantities of bulk wheat required from the Board for each of the ships with which I am concerned were properly notified in due time by the respective charterers.

[His Lordship referred to the position of the Canadian Wheat Board and said that no relevant order under section 10 of the Canadian Wheat Board Act, 1935, had been proved before him; it had been agreed before him that he should be at liberty to construe the Canadian Act without formal proof and without expert evidence from experts versed in Canadian law. His Lordship next referred to the factual position as to the terminal elevators at Vancouver, New Westminster and Victoria, and to the facts as to the strike in relation to the dates upon which the vessels were nominated to and arrived at Vancouver, and continued:] According to Mr. Glendenning, an experienced ship's agent, it was not even clear up to 24 hours before the strike began that there would be a strike. In the negotiations which had led to the 1952 agreement the dispute had been settled an hour before the strike deadline, and in fact, within the memory of the witnesses who were called, no strike of elevator men had in fact ever taken place.

The contemporaneous letters and records put in evidence show a rather confused picture at this time as to the generally accepted view as to the likely duration of the strike. For instance, Messrs. Thomson & Earle on February 18/19 cabled to the Ministry as follows: "Strike settlement general opinion strike may last one "to three weeks but no negotiations between operators' union "present."

The Vancouver News Herald of February 21 published a statement that the grain elevator workers' union had stated that they were confident of an early end to the dispute. Others took a less favourable view of the situation. Meanwhile, on February 18 an embargo was placed by the railways on any movement of grain from up-country elevators to the strike-bound terminal elevators and an understanding was reached between the union and the operators of Midland Pacific and, I think, Richardson's, that they would only handle wheat coming from their own regular suppliers and would notify the union if any wheat from other sources was offered to them. In fact none was offered and Midland Pacific and Richardson's were virtually unaffected by the strike. I am satisfied that if wheat not coming from their regular suppliers had been handled, these elevators would also have come out.

On February 19 Mr. Phelps of the Prairie Farmers' Union, whose members were of course vitally affected by the embargo on movement of grain from up-country, offered to mediate and, though the union accepted the offer on February 23, the operators, who had difficulty in getting their members' views, on March 6 turned down Mr. Phelps's offer.

By cable dated February 26/27 Messrs. Thomson & Earle Ltd. reported to the Ministry as follows: "Vancouver strike situation "obscure. No negotiations: anybody's guess duration: local "opinion settlement may still be two three weeks away or "longer."

Mr. Phelps reported his inability to get the parties together to the Federal Government and asked for governmental intervention. The refusal by the operators to accept the mediation of Mr. Phelps may be said to mark the end of the first stage of the strike.

Meanwhile the Canadian Wheat Board had not been inactive. Faced with the situation that only two out of the eight elevators were working, and not knowing how long the strike would last, the Board, acting through Mr. Smith, the manager for the Board in Vancouver, decided as a matter of policy, in order to make the best possible use of the port and the available supplies of wheat, to confine the use of the two non-strike-bound elevators to the supply of parcels to "liners" or "F.I.O. bottoms," viz., vessels plying in and out of Vancouver on more or less regular schedules for passengers and goods and loading on berth terms, and not to use these elevators for loading full cargoes of wheat on chartered tramps, but to load these vessels after the strike in the order of their arrival in the port. Mr. Smith summarised his evidence on this point in the following passage: "There are certain liners in "and out of here (Vancouver) regularly which have to keep a "regular schedule both for passengers and cargoes up and down "the coast and it was felt by all of us concerned that the proper "thing to do would be to keep as many of these vessels running "as possible and use what small amount of wheat we had available to the best advantage." This policy decision was discussed with and accepted by the Vancouver Chamber of Shipping on March 2 as being in the best interests of the community. No criticism was directed against this decision at the time and, so far as it is a question of fact for me, I find that the policy of the Board acting through Mr. Smith was a reasonable policy to adopt in the discharge of their duties. This policy was pursued throughout the strike and no tramp (with the exception of the *Trelyon*, which, as stated above, was diverted to Victoria) was loaded with either a full or part cargo of wheat during that time. This decision affected about 100 liners and tramps arriving at Vancouver between February 17 and May 7 to load grain; only a proportion of these vessels were under engagement to load for the three governments.

I now return to the second stage of the strike. Mr. Phelps having asked for government intervention, Mr. Bernard Wilson, an official of the Federal Conciliation Service, arrived at Vancouver on March 9. After examining the position Mr. Wilson on March 16 put up six proposals for the parties' consideration, the most important being a wage increase of 3 cents per hour retrospective to December 1. The union rejected all six proposals, while the operators, rejecting the proposed wage increase, were prepared to accept part of the remaining proposals. On March 20 Mr. Wilson returned to Ottawa, having put forward a new series of proposals which involved for the first time the suggestion that part of the matters in dispute should be referred to arbitration. This may be said to mark the end of the second stage of the dispute.

Before either party had replied to this suggestion for arbitration, the *Riverton* on March 22 and the *Cape Rodney* on March 27 had been ordered by the Ministry of Food to Vancouver to load.

[His Lordship referred to the settlement of the strike on May 7 and the preceding events, and continued:] When evidence was taken on commission in Canada in April, 1958—five years after the events in question—Mr. Tupper Q.C., who acted in the discussions for all the elevators except the New Westminster elevator, and Mr. Munro Q.C., who acted for the New Westminster elevator, were examined and cross-examined at length, as was Mr. Sims of the union and other witnesses, as to their views as to the likely duration of the strike and of the detailed steps in the strike, and as to their opinion as to what the man in the street or a charterer would at the time have thought. I have read and re-read their evidence and that of other witnesses dealing with these points and all the voluminous contemporary newspaper cuttings and correspondence. It would extend this judgment to an inordinate length if I attempted to set out even in summary form the effect of this evidence. I content myself with saying that on this evidence I have reached the following conclusions:

(a) That at no time before the strike began or at any stage during its continuance was the position such that a well-informed observer in the position of a shipowner or charterer making use of the facilities for inquiry open to him could have formed any really reliable appreciation as to the likely duration of the strike.

(b) That in fact at no time before the strike began or at any stage during its continuance was it on balance of probabilities likely—still less was it certain—that the strike would last more than two or three weeks or more than a further two or three weeks.

It seems to me that the fact strongly relied upon by counsel for the plaintiffs that a relatively small number of men, viz., about 250/260 in all, were actually on strike, works both ways. With a compact body of strikers it may well be argued that decisions may be easier to arrive at; but I see no reason for thinking that this factor should be put in the scales in favour of a long strike. Two cogent factors in favour of the less pessimistic view are, in my view, (1) that there was no history of embittered industrial relations in this particular industry before the strike in question, and (2) that the strike was never more than partial.

This strike, although it turned out to be a long strike, did not in my judgment differ in its essentials from other strikes. It is an obvious truism that no one can predict in advance how long a strike will last, and, even when the contestants appear to be far apart, a strike may end suddenly without any advance warning. In this connection I was usefully referred to a number of reported cases in which the courts have had to consider strikes in relation to problems of frustration, and it is true to say that in no case, except possibly *The Penelope*,[1] has it been held that a strike has brought into operation the doctrine of frustration. For instance, in *Bulman and Dickson* v. *Fenwick & Co.*[2] the question arose whether under a charterparty containing an exception of any delay occasioned by strikes, which provided that the vessels should discharge at a number of places in the Thames,

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[1] [1928] P. 180; 44 T.L.R. 597.

[2] [1894] 1 Q.B. 179; 10 T.L.R. 45.

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including the Regent's Canal, the charterers were entitled to insist upon the vessel remaining at Regent's Canal when a strike broke out after Regent's Canal had been nominated. Though, as appears from the argument as reported in *Dobell & Co.* v. *Green & Co.*,[3] it had been argued that the strike was a labour war and was bound to last so long as to defeat the adventure, Pollock B. held [4] that the strike was very sudden and unexpected, and again no one could tell at what period the strike would be over, and Lord Esher M.R. said [5] "this is as clear a case as can be." In *Dobell & Co.* v. *Green & Co.* Collins L.J. said [6]: "I think it "would be unreasonable, having regard to the uncertainty of the "duration of strikes, to impose upon the charterers an obligation "to name a colliery where there was no strike in existence at "the time." In *Ropner* v. *Ronnebeck* Bailhache J. said [7]: "I "have never heard it suggested before today that a charterer is "not bound to load a steamer which is ready to take a cargo on "board because of the existence of a strike which might affect "the time of her sailing. I am not prepared to be the first to "apply the principle which, as I have said, has been applied in "cases arising at a time of war to cases arising through the exist"ence of a strike: to do so would be a new principle. Strikes, "of course, vary in length. No man can say when a strike begins "whether it will be a long strike or a short one." Again, in *Metropolitan Water Board* v. *Dick Kerr & Co. Ltd.*, Scrutton L.J., approving the reasoning of Bailhache J. in the case last cited, said [8]: "Strikes have always been treated by the courts as "subject to such unexpected termination that they cannot with"out more be treated as abrogating contracts." (As regards *The Penelope*,[9] it seems to me that the better view of this confusing case is that Lord Merrivale held that it was the coal embargo rather than the strike that produced frustration.) Finally, in *South African Dispatch Line* v. *Panamanian S.S. Niki (Owners)*, Diplock J., obiter, said [10]: "A strike being something which may end "at any time, the charterer is entitled to exercise his rights under "the charterparty to send a vessel to a strike-bound port in the "hope and expectation that the strike will be over when he "gets there." I cite these passages for the moment as merely indicating the approach of the courts to the problem of strikes rather than for the legal consequences that follow from such approach.

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[3] [1900] 1 Q.B. 526; 16 T.L.R. 204.

[4] [1894] 1 Q.B. 179, 182.

[5] Ibid. 185.

[6] [1900] 1 Q.B. 526, 533.

[7] (1914) 20 Com.Cas. 95, 99; 112 L.T. 723.

[8] [1917] 2 K.B. 1, 35.

[9] [1928] P. 180.

[10] [1959] 1 Q.B. 238, 252; [1958] 3 W.L.R. 718; [1958] 3 All E.R. 590.

I now turn to the questions which I have referred to above as being the questions of primary importance under head 1, viz., as to the obligations of the charterers when the intended port of loading or a nominated port of loading becomes "strike-bound" in the sense of being a port at which loading of the vessel cannot take place within a reasonable time or without such delay as would frustrate the commercial object of the adventure. These questions I take first, as in the case of each ship they arise first in chronology.

Though on my findings of fact as to the strike it is not necessary for me to express any final opinion on these questions, it is probably desirable that I should do so in view of the sustained and interesting arguments addressed to me upon them.

There is no dispute between the parties on one point at least. The obligation, if any, to name a substitute port after a properly nominated port becomes strike-bound and the limitation (if any) upon the charterers' option as to nominating loading ports which are not strike-bound do not arise by reason of any express provision of the charter, but arise, if at all, by implication from its express terms. For my part I approach the question of implying terms into a written contract with great caution, especially when the material contract is a charterparty such as those in the present cases which make detailed and elaborate provisions for a great and varied number of contingencies. As Scrutton L.J. observed in *Brightman & Co.* v. *Bunge y Born Limitada Sociedad*[11] in relation to the charterparty there in question: "It contains "phrases which are not easy to construe, as is often the case "when parties with conflicting interests adopt an ambiguous form "which each side dare not make more precise for fear the other "party should disagree with their meaning if stated precisely."

The limits within which terms can be implied are now well settled in principle, though difficulty still lies in their application. The court will only imply such terms as are necessary to give such business efficacy to the contract as both parties must have intended. It is not sufficient to show that an implication would be reasonable, for it is not the function of the court to make a contract for the parties. I bear in mind the often quoted passage in Lord Watson's speech in *Dahl* v. *Nelson, Donkin & Co.*[12]

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[11] [1924] 2 K.B. 619, 629.

[12] (1881) 6 App.Cas. 38, 59.

In broadest outline the argument on behalf of the ship proceeded upon these lines:

(1) In the opening clause of the charterparties the range of loading ports and the range of permitted cargoes is dealt with in substantially the same language, and a priori it is reasonable to suppose that the options as to ports should be exercised in the same manner and subject to the same limitations as the options for cargo.

(2) If, as is established by the decision in *Brightman & Co.* v. *Bunge y Born Limitada Sociedad*,[13] it is the duty of the charterer when once a class of contractual cargo becomes impossible to load to take steps after a reasonable time to ship another class of contractual cargo not subject to such impossibility, it must be by analogy the duty of the charterer to nominate a substitute loading port when the port first nominated becomes strike-bound, and, if no port has been nominated, to nominate a port which is not strike-bound.

(3) On the authority of *Duncan* v. *Köster* (*The Teutonia*),[14] it is the duty of the charterer, when the port first nominated becomes strike-bound, to nominate from the range a further port which is not strike-bound.

(4) That just as the court must in considering the content of the phrase "proceed to a port as ordered" or "proceed to X "or so near thereto as she can safely get" imply the term that the vessel can get to the port in safety within a reasonable time or without such delay as will frustrate the commercial adventure, so the court by analogy in considering whether the port nominated is or remains a proper port from the point of view of the loading facilities, must imply the term that the port must be in such a condition that loading can take place within a reasonable time or without such delay as will frustrate the commercial adventure.

As to (1), my first comment is that argument by way of analogy is dangerous; if the facts are the same, the analogy is unnecessary; if the facts are different, the difference in fact may destroy the analogy. Secondly, accepting as I must that the decision in *Brightman & Co.* v. *Bunge y Born Limitada Sociedad* [15] is good law, it seems to me that there is a striking difference between a switch over from one type of cargo to another, which may not involve even the movement to another loading berth, and a switch over to another port in the range which will necessarily involve clearance from the port which is being vacated, probably an ocean voyage to a new port and entry into the new port, all at the expense of the shipowner. If it is said that in the circumstances contemplated the shipowner would readily shoulder these expenses, this, as it seems to me, is no answer, since if the charterer is under the obligation alleged, he must have the right to switch over even though the shipowner objects.

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[13] [1924] 2 K.B. 619.

[14] (1872) L.R. 4 P.C. 171.

[15] [1924] 2 K.B. 619.

I now turn to the argument (2) based on *The Teutonia.*[16] This decision is, of course, a decision of the Privy Council on appeal from Phillimore J., sitting as judge of the High Court of Admiralty, and as such is not strictly binding upon me, though entitled to the greatest respect. It is a decision which, in later decisions and in the textbooks, has been the subject of much differing comment, but so far as I know, except in one passage in Scrutton on Charterparties, 11th ed., p. 124, and 16th ed., p. 129, Case 1, it has never been suggested to be an authority for the proposition that, the charterer having nominated a safe port which becomes unsafe before the vessel arrives at or off the port, the master is entitled to call upon the charterers to nominate another safe port within the charter range.

As appears from the report of the proceedings before Phillimore J.,[17] the proceedings were instituted under section 6 of the Admiralty Court Act, 1861, by petition by the assignees of cargo shipped on board the *Teutonia*, a Prussian vessel at Pisagua and bound for Cork, Cowes or Falmouth for orders, which orders by the charterparty were limited to orders to any safe port in Great Britain or on the Continent between Havre and Hamburg. The vessel proceeded to Falmouth and, arriving there on July 10, received orders to discharge at Dunkirk. At that time no war had broken out between France and Prussia. But on arrival off Dunkirk the master received information that war had broken out and so proceeded to the Downs. While at the Downs it was confirmed that war had broken out, and on instructions from the owner the master proceeded to Dover, where the ship remained with the goods on board. The consignees demanded possession of their cargo at Dover without paying or offering to pay the freight or any portion thereof, but the master refused to deliver the goods to them. The main issue in the action was as to the master's right not to put into Dunkirk on receipt of intelligence that war had broken out. This point, which was decided in favour of the master, is irrelevant in the present case. On the second point, namely, the right of the merchant to delivery of the cargo freight free, Phillimore J.[18] makes it quite clear that even if there were such a right at common law it would not necessarily be the law administered by a Court of Equity or by the Admiralty Court, and he concludes as follows[19]: "After as "careful a consideration as I have been able to give to the general "principles of jurisprudence applicable to the circumstances of "this case, in the absence of any direct judicial precedent I have "arrived at the following conclusion, that the owners of the "*Teutonia* have not committed a breach of contract contained "in the charterparty and bill of lading, first by refusing in the "circumstances to carry the cargo to the port of Dunkirk or, "secondly, by refusing to deliver up the cargo to the plaintiffs "at Dover without any payment of freight whatever either pro "rata itineris or by way of compensation for the carriage of his "goods." Though in the Privy Council the advice as delivered by Mellish L.J. proceeded on the lines that the original contract was not dissolved by the impossibility of delivering the cargo at Dunkirk, I can find nothing which suggests that the Board were accepting the shipowners' argument "that the charterer was "bound to select another port from among those named in the "charterparty" or that its acceptance of that argument was implicit in the conclusion at which the Board arrived. Although it was argued[20] that the Court of Admiralty can only exercise a common law jurisdiction, I do not understand the Privy Council to be accepting this contention. So to hold would be contrary to the later decisions of the Court of Appeal in *The Gaetamo and Maria*, *per* Brett L.J.[21]

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[16] L.R. 4 P.C. 171.

[17] L.R. 3 A. & E. 394, 395.

In my judgment *The Teutonia*[22] is no authority for the proposition that according to English common law a charterer, having once made a proper nomination of a port, is obliged to make a second nomination when the port first nominated becomes an impossible port. At most (apart from the point as to the master's right to act on reasonable intelligence) it supports the proposition that the port nominated must be safe both at the time of ordering and at the time when the ship gets there; for which proposition it is cited in Scrutton on Charterparties, 11th ed., p. 123, note (4), and 16th ed., p. 128, note (*d*).

Against the wider proposition that a substitute port must be ordered after a proper nomination has been made, there is a well-settled line of authority to the effect that, once a port has been properly nominated, the charterparty is to be construed as if the nominated port had been originally written into the charterparty. See *Tapscott* v. *Balfour*, *per* Bovill C.J.,[23] which was accepted in *Tharsis Sulphur and Copper Co.* v. *Morel Bros. & Co.*, *per* Lord Esher M.R.,[24] *per* Bowen L.J.[25] and *per* Kay L.J. as reported,[26] as supporting that proposition. To the same effect is the judgment of Kennedy L.J. in *Leonis S.S. Co.* v. *Rank Ltd.*[27] More recently the same principle was restated by Devlin J. in *Anglo-Danubian Transport Co. Ltd.* v. *Ministry of Food*,[28] where the judge adds the further point that the charterer, having once made a proper nomination, has not the right—still less the obligation—to make a second nomination.

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[18] L.R. 3 A. & E. 394, 417.

[19] Ibid. 424.

[20] L.R. 4 P.C. 171, 175.

[21] (1882) 7 P.D. 137, 143.

[22] L.R. 4 P.C. 171.

With this class of case must be contrasted cases where the original nomination has been held to be bad and therefore nugatory. In such a case—at least unless the shipowner has treated the original nomination as an anticipatory breach—the charterer can, so long as his time for doing so has not expired, make a fresh nomination which, if good, will be treated as written into the contract. Such a case is *A/S Olivebank* v. *Danck Svovlsyre and Supherphosphat Fabrik.*[29] In that case the nomination of a Danish port to which a British ship could not lawfully proceed to deliver nitrate was held by Bailhache J.[29] as a "mere nugatory "nomination," and he held that the charterers were obliged to give a fresh nomination of a port within the charter range. In the Court of Appeal each of the Lords Justices treated the original nomination as ineffective, though Bankes L.J. preferred to rest his judgment on rather different grounds from that adopted by Bailhache J.

Next, as to point (4) of the summary of the shipowners' argument, viz., that just as the court in considering the content of the phrase "proceed to a port as ordered," or "proceed to X or so "near thereunto as she can safely get," will imply the term that the vessel can get there in safety within a reasonable time or without such delay as will frustrate the commercial adventure, so the court by analogy in considering whether the port nominated is or remains a proper port from the point of view of loading facilities must imply the term that the port must be in such a condition that loading can take place within a reasonable time or without such delay as will frustrate the commercial adventure.

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[23] (1872) L.R. 8 C.P. 46, 52.

[24] [1891] 2 Q.B. 647, 650.

[25] Ibid. 652.

[26] 65 L.T. 662

[27] [1908] 1 K.B. 499, 518; 24 T.L.R. 128.

[28] 65 T.L.R. 762; [1949] 2 All E.R. 1068; 83 Ll.L.Rep. 137, 139.

[29] [1919] 1 K.B. 388, 392; [1919] 2 K.B. 162 (C.A.).

For my part, I derive little assistance for the purpose of solving the present problem from *Nelson* v. *Dahl*,[30] important as that case is in other branches of shipping law. In that case the question for determination was whether under a charterparty to "proceed to London, Surrey Commercial Docks or so near "thereunto as she might safely get and deliver her cargo," the shipowners were entitled to deliver the cargo at Deptford Buoys outside the Surrey Commercial Docks by reason of the fact that no berth could be obtained in the docks owing to congestion which was likely to last for many months. The importance of the case in other branches of shipping law is that it decided that in construing the phrase "or so near thereunto as she can safely "get" it was legitimate to treat as "permanent not only "obstacles which will remain for ever but also obstacles which "will prevent entry for a time which is unreasonable having "regard to the object of the common adventure." See *per* Lord Watson[31]: "There must in each case be some limit of time "within which an obstacle ceasing to exist cannot be regarded as "permanent and beyond which a continuing obstacle ceases to "be permanent." This case, in my judgment, throws no light, or at least a very indirect light, on the problem in the present case.

Admittedly, with the exception of the obiter observations of Diplock J. in *South African Dispatch Line* v. *Panamanian S.S. Niki (Owners)*,[32] to which I have already referred, there is no reported case in which the strike-bound port problem has been considered. But in the argument before me both sides in turn relied upon the well-known cases of *Tharsis Sulphur and Copper Co.* v. *Morel Bros. & Co.*[33] and *Bulman & Dickson* v. *Fenwick & Co.*[34] In *Tharsis Sulphur and Copper Co.* v. *Morel Bros. & Co.*[35] (in which the court consisted of Lord Esher M.R., Bowen and Kay L.JJ.) the vessel was chartered to proceed to the Mersey and deliver her cargo at any safe berth as ordered on arrival in the dock at Garston. On arrival a berth was ordered by the harbour-master as customary, but there was delay in unloading due to the crowded state of the dock, which prevented the vessel being berthed for some time and the shipowners claimed demurrage.

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[30] (1879) 12 Ch.D. 568, sub nom. *Dahl* v. *Nelson, Donkin & Co.* (1881) 6 App.Cas. 38.

[31] 6 App.Cas. 38, 59.

[32] [1959] 1 Q.B. 230, 252.

[33] [1891] 2 Q.B. 647.

[34] [1894] 1 Q.B. 179.

[35] [1891] 2 Q.B. 647.

The actual decision was that the vessel did not become an arrived ship until she got into berth, but in Bowen L.J.'s judgment there is a valuable passage dealing with exercise of the option. The learned Lord Justice says[36]: "Then we were told "that an option was given to the charterer and that it was not "properly exercised unless a berth was chosen that was empty. "But I think there was confusion in this argument also. The "option is given for the benefit of the person who has to exercise "it. He is bound to exercise it in a reasonable time, but he is "not bound in exercising it to consider the benefit or otherwise "of the other party. The option is to choose a port or berth "which is reasonably fit for the purpose of delivery. It will not "do, for instance, to choose a dock the entrance of which is "blocked—that would be practically no exercise of the option "at all, and I think this is what Lord Blackburn meant in *Nelson* "v. *Dahl*,[37] and follows from the cases which he there cited of "*Ogden* v. *Graham*[38] and *Samuel* v. *Royal Exchange Assurance* "*Co.*[39] To limit the option of the charterer by saying that, in "the choice of a berth, he is to consider the convenience of the "shipowners is to deprive him of the benefit of the option. The "most that can be said is that the charterer does not exercise his "option at all unless he chooses a berth which is free or is "likely to be so in a reasonable time." I have compared this report with the reports in the Law Times[40] and the Law Journal Queen's Bench,[41] and I think it is quite clear that Bowen L.J. was using the word "free" as opposed to physically obstructed. He was so understood by Pollock B. in *Bulman and Dickson* v. *Fenwick & Co.*[42] In that case the vessel was to proceed to "London, either to the Pool, Regents Canal, Victoria Docks, the "Derricks, Beckton, or other safe berth as ordered." After the voyage commenced but before arrival of the vessel off the Thames, the charterers ordered her to Regents Canal. After the order was given they became aware of the fact that there was a strike of coal-porters at Regents Canal which did not extend to the other places named in the charterparty. It was argued on behalf of the ship that the charterers should have changed the order. The argument on behalf of the ship in the Court of Appeal, based upon the judgment of Bowen L.J. in *Tharsis Sulphur and Copper Co.* v. *Morel Bros. & Co.*,[43] namely, that "the charterers must "choose a berth where the commercial adventure can be carried "out and ought not to send the ship to any place where there is "a strike" was rejected, Lord Esher M.R. (in whose judgment Lopes and Kay L.JJ. concurred) saying[44]: "This is as clear a "case as can be. The question is whether the defendants did "anything more than they were by the terms of the charterparty "entitled to do in ordering the vessel to the Regents Canal. The "shipowners undertook that the vessel should proceed to London, "either to the Pool, Regents Canal, Victoria Docks, the Derricks, "Beckton, or other safe berth as ordered. There is nothing from "which any limitation can be implied on the power of the "charterers as to the choice of the place to which the ship should "go unless, perhaps, there is an implied limitation in case something arises which makes the Regents Canal one to which a "ship of this kind cannot go as, for instance, if the entrance is "blocked. At the time when the charterers ordered the ship to "the Regents Canal there could be no objection to such an order, "and there was nothing which happened afterwards to oblige the "charterers to alter their order." (In the report in the Law Journal Queen's Bench[45] Lord Esher is reported as having given a different illustration from the illustration of a blocked port, namely, the illustration of a port which had become unsafe by reason of the outbreak of war, but the principle is the same.)

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[36] [1891] 2 Q.B. 647, 652.
[37] 6 App.Cas. 38, 44.
[38] (1861) 1 B. & S. 773.
[39] (1828) 8 B. & C. 119.
[40] 65 L.T. 659.
[41] 61 L.J.Q.B. 11.
[42] [1894] 1 Q.B. 179, 184.

In Scrutton on Charterparties, 11th ed., p. 137, note (*h*); 16th ed., p. 142, note (*h*), the comment is made that "in *Bulman and* "*Dickson* v. *Fenwick & Co.*[46] [the Court of Appeal] appears to "hold that the only limitation to the charterer's power to select "a berth is that he must not choose one that is so blocked that "the obstacle cannot be removed in a time consistent with the "commercial adventure."

(In both these cases the obligation was to name a *safe* berth or place. Mr. Mocatta, on behalf of the charterers, was (as I understand his argument) prepared to accept for present purposes that even if, as in the present cases, the qualification of safety is not used, there would be an implied limitation to nominate safe berth or place in the sense of berth or place to which the vessel could proceed without such delay as would defeat the commercial purpose. For my part, I should wish to reserve this question, which does not arise for solution in the present case, as I do not feel that it is wholly covered by authority.)

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[43] [1891] 2 Q.B. 647.

[44] [1894] 1 Q.B. 179, 185.

[45] 63 L.J.Q.B. 123, 127.

[46] [1894] 1 Q.B. 179.

In my judgment, it is impossible to derive from these cases any support for the proposition that the charterer is not entitled on a charterparty in the present form to nominate a loading port which is "strike-bound" as defined above, or is bound to make a fresh nomination when the originally nominated port became "strike-bound." I further consider that strong support for the contrary view is to be found in *Dobell & Co.* v. *Green & Co.*[47] (the argument in 5 Com.Cas. 161 showing that the alternative port point was argued). The facts of that case may be summarised as follows: On January 14, 1898, the vessel was chartered to load a cargo of South Wales coal from Cardiff for delivery at Iquique. By the charter the vessel was to proceed to such loading berth as the freighters may name, and there load a cargo of steam coal as ordered by the charterers which they "bind themselves to ship "(except in the event . . . of strike of shippers' pitmen): the "vessel to be loaded as customary but subject in all respects to "the colliery guarantee in . . . colliery working days. . . ." On February 3 the charterers purchased two cargoes, one intended for the vessel in question, from Hoods Colliery. On April 6 the South Wales coal strike began, lasting till September 1. On April 20 the charterers obtained from Hoods Colliery the usual colliery guarantee: this was rejected by the ship's agents who demanded a colliery guarantee from, and the nomination of, a colliery which was not on strike. The charterers refused to give way and the vessel, after proceeding to Cardiff, remained there throughout the strike when she loaded without undue delay. The argument advanced on behalf of the ship, based upon the judgment of Bowen L.J. in *Tharsis Sulphur and Copper Co.* v. *Morel Bros. & Co.*[48] was rejected. A. L. Smith L.J. says[49]: "Where "can be found in the charter any term that an order must be "given to load from a colliery which is not on strike? As I have "already pointed out, the charterparty expressly provides that "any loss from a strike is to fall upon the shipowners. I can find "nothing in the charter which imports any such limitation of the "charterer's right to select the colliery from which the coal is to "be shipped, as is contended for by the plaintiffs." So, too, Collins L.J.[50]: "It seems to me that by the terms of the charter-"party as between these two business firms the risk of any

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[47] [1900] 1 Q.B. 526; 5 Com.Cas. 161.

[48] [1891] 2 Q.B. 647.

[49] [1900] 1 Q.B. 526, 532.

[50] Ibid. 533.

"difficulty arising from a strike was deliberately put upon the "shipowners, and, that being so, that the very case contemplated "by the exception as to strikes has arisen." (I have already referred to the passage from his judgment referring to "the "uncertainty of the duration of strikes.")

If reinforcement for the view that the charterer's choice is unfettered is needed, it is to be found in the judgment of Parker L.J. in *Agrimpex Hungarian Trading Co. for Agricultural Products* v. *Sociedad Financiera de Bienes Raices, S.A. (The Aello)*,[51] where he says: "Having by the contract obtained the right to exercise "different options, it seems to me that they [the charterers] can "choose which to exercise regardless of how it may affect the "shipowners. Otherwise one would be introducing a qualifica-"tion into the exercise of what is by the contract an absolute "right."

In my judgment, having regard to the authorities and to the express provision in clause 31 dealing with delay by strikes, it is quite impossible to imply into these charterparties any such limitation upon the charterers' rights as is contended for by the shipowners, or to impose an obligation upon the charterers to make a fresh nomination when the port originally nominated becomes strike-bound. From this point of view, it is immaterial whether on the facts the charterer is or is not protected by the exceptions clause.

I am reinforced in this view I have formed by the observations of Diplock J. (admittedly obiter though made after hearing full argument) in *South African Dispatch Line* v. *S.S. Niki (Owners)*,[52] though part of his reasoning may not apply to the particular charterparties in these cases.

On this branch of the case no separate argument was addressed to me in support of the alleged warranty. It is sufficient for me to say that, in my judgment, this contention equally fails for substantially the same reasons. Further, the nomination when made was either good or bad. If good, no warranty is required; if bad, the shipowner's remedy lies elsewhere.

For completeness I should add that, though there was some evidence that the Ministry of Food might have been in some temporary difficulty in undertaking the dollar commitments which would be involved in purchasing grain in the United States, there was evidence, which was not seriously challenged, that supplies were available in United States ports and could have been shipped without undue delay.

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[51] [1958] 2 Q.B. 385, 405; [1958] 3 W.L.R. 152; [1958] 2 All E.R. 695.

[52] [1959] 1 Q.B. 238, 253.

II. I now turn to the second main branch of the argument in these cases which poses the question whether, accepting that Vancouver was and remained a properly nominated loading port, the charterers can bring themselves within the exceptions clause?

This question primarily involves (1) the proper construction of the particular clause, and (2) the application of the clause so construed to the particular facts.

On the question of construction it must first be observed that the clause in question is drawn in particularly wide terms—wider, I think, than in any corresponding clause in any of the many cases to which I have been referred. In the first place, it deals not only with delay in loading the cargo or the intended cargo, but also with delay in the supply or bringing down of the cargo. In *Pinch & Simpson* v. *Harrison, Whitfield & Co.*,[53] in commenting upon a somewhat less extensive clause which included the phrase "provision of cargo," Denning J. said: "It seems to me that "these words 'provision of cargo' are expressly put in to deal "with the situation which has arisen in some cases whereby the "word 'loading' has sometimes been construed as applying only "to the operation of loading from the wharf or quay on to the "ship. The words 'provision of cargo' were probably taken from "Lord Dunedin's judgment in *Arden S.S. Co. Ltd.* v. *Mathwin & "Son*,[54] and were put in to expand the scope given to the "word 'loading.'" Whether this is a legitimate method of approach, it undoubtedly emphasises what may be said to be a truism that the court is primarily concerned with the particular words in the charterparty before it, and has to exercise caution in drawing inferences or principles from decisions upon other types of clause. Secondly, the enumerated causes of delay are extremely varied and exhaustive. Thirdly, the concluding words "or any other hindrance of whatsoever nature beyond the "charterers' control" are not limited to causes ejusdem generis with the specified causes and must be given their literal meaning. See *Larsen* v. *Sylvester & Co.*[55] Fourthly, this clause, though expressed to be a clause which cuts out from the lay or working days the time during which the delays operate, is properly to be regarded as a qualification upon the charterers' absolute obligation to have the cargo or sufficient cargo ready at the loading

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[53] (1948) 81 Ll.L.Rep. 268, 273.

[54] 1912 S.C. 211.

[55] [1908] A.C. 295; 24 T.L.R. 640.

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REARDON SMITH LINE LTD.
v.
MINISTRY OF AGRICULTURE, FISHERIES AND FOOD.

GARIBALDI SOCIETA CO-OPERATIVE DI NAVIGAZIONE A.R.L.
v.
PRESIDENT OF INDIA.

CARLTON STEAMSHIP CO. LTD.
v.
MINISTRY OF AGRICULTURE, FISHERIES AND FOOD.

CAPE OF GOOD HOPE MOTOR SHIP CO. LTD.
v.
SAME.

MIRAMAR COMPANIA NAVIERA S.A.
v.
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McNair J.

port. See *per* Lord Sumner in *Bunge y Born Limitada Sociedad* v. *Brightman & Co.*,[56] and Lord Dunedin.[57]

Fifthly, there is, in my judgment, if I may respectfully say so, great force in the observation of Fletcher Moulton L.J. in *Leonis S.S. Co. Ltd.* v. *Joseph Rank Ltd.* (*No. 2*),[58] where he says: "We have had a very able argument from Mr. Hamilton in "which he tried to make very fine distinctions as to the real scope "of the several words used in the clause. In my opinion, this "is a business document drawn up by business men to be used "in a business sense, and there is no room for these very fine "distinctions. We have to look at the question from the point "of view of business men and ask: Was this a strike which "stopped the cargo being delivered to the steamer?" See, too, *Larsen* v. *Sylvester & Co.*[59] Finally, it is well to bear in mind the essentially practical approach of Lord Dunedin in *Leyland Shipping Co.* v. *Norwich Union Fire Insurance Society* [60] in reference to the proper application of the causa proxima rule in policies of marine insurance where he says: "My Lords, we have had a very "large citation of authority in this case and much discussion on "what is the true meaning of causa proxima. Yet I think the case "turns on a pure question of fact to be determined by common "sense principles. What was the cause of the loss of the ship? I "do not think that any ordinary man would have any difficulty in "answering that she was lost because she was torpedoed."

On the facts as I have so far found them, I have little doubt that the ordinary man would without hesitation say that the delay in bringing down the cargo or intended cargo and the loading of it on to those ships was caused by the strike which broke out on February 17 and continued until May 7. I do not believe that the ordinary man, if he had reached the conclusion which I have reached that the policy decision of the Canadian Wheat Board to use the small quantity of wheat available for loading liners rather than tramps was a reasonable policy taken in the emergency created by the strike, would have had any hesitation in saying that looking at it from a "business point of view" or "on "common sense lines" it would be absurd to differentiate between the strike and the emergency taken in view of the strike. Unless I am precluded by authority to the contrary (which I do not believe I am), I should come to the same conclusion and hold that on each of the cases with which I am concerned the cause of the delay was the strike.

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[56] [1925] A.C. 799, 816–817.

[57] Ibid. 807.

[58] (1908) 13 Com.Cas. 295, 297.

[59] [1908] A.C. 295.

[60] [1918] A.C. 350, 362.

The first answer in logical order (though not in order of presentation) made by counsel on behalf of the ships was that, by a well-settled rule of construction, exceptions clauses in a charterparty should not be construed to apply to a state of facts which was in existence when the contract was made. (See II (f) above.) In other words, the specified event in order to operate as an exception must be exceptional or abnormal and not one which was bound to be operative. The earliest case in which this doctrine was adumbrated appears to be *France Fenwick & Co.* v. *Spackman (Philip) & Sons*,[61] in which Bailhache J. obiter said: "If I had not found that the circumstances at the time of discharge were exceptional, I should have acceded to Mr. Roche's argument that to bring themselves within the exceptions clause, it is not enough for the defendants to say that they were prevented, but that they must say that they were prevented by some cause which was exceptional. If a person contracts to discharge in 36 hours unless prevented by some cause beyond his control which always would prevent discharge within that time, then, in my opinion, it is not an exception at all, and, if in such a case he fails to discharge within the 36 hours, he is not within the exceptions clause." See also Scrutton on Charterparties, 11th ed., p. 240, note (f), commenting on the phrase "other causes beyond charterers' control": "In any case the 'cause' must be something abnormal. If a charterer undertakes to do a thing (e.g., discharge in so many hours) which in all the circumstances is impossible for him, the cause or causes which prevent him doing it cannot be within such a clause." Next, in *Ciampa* v. *British India S.N. Co. Ltd.*,[62] Rowlatt J. acceded to Mr. Roche K.C.'s argument based upon *France Fenwick & Co.* v. *Spackman (Philip) & Sons*,[63] and held that the ship, which after calling at a plague-contaminated port had loaded lemons at Naples for London, could not, when the lemons were damaged at Marseilles by a process of "deratisation" under the ordinary municipal law of France, rely upon the exception of "restraint of princes." The learned judge says[64]: "I am not deciding that the application of the ordinary law of a country may not in some circumstances constitute a 'restraint of princes,' but I think that the facts

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[61] (1912) 18 Com.Cas. 52, 57.

[62] [1915] 2 K.B. 774.

[63] 18 Com.Cas. 52.

[64] [1915] 2 K.B. 774, 779.

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McNair J.

"which bring that law into operation must be facts which have "supervened after the ship has started on the voyage in question. "When facts exist which show conclusively that the ship was "inevitably doomed before the commencement of the voyage "to become subject to a restraint, I do not think there is a "'restraint of princes.'"

In *Naamlooze Vennootschap A.C. Lensens Stoomvaart/Maatschappij* v. *Muller & Co. (London) Ltd.*[65] Roche J., while accepting the correctness of Bailhache J.'s dictum in the *France Fenwick* case,[66] refused to apply it to the facts of that case (which involved a delay in discharge through labour trouble over night work) on the ground "that abstention from night work, at "the time when the charterparty was entered into and at the "time when the discharge began, was still quite an exceptional "matter and not an established and ordinary matter." There is also rather an obscure reference to the same point in *Mitsubishi Shoji Kaisha Ltd.* v. *S. Soskin & Co. Ltd.*[67]

The next appearance of the doctrine seems to be in the judgment of Lord Hunter in *Taylor* v. *John Lewis Ltd.*[68] in the Inner House of the Court of Session, where the learned judge applied the reasoning of Rowlatt J. in the *Ciampa* case [69] saying: "In "the present case both parties knew at the time when the "contract was entered into that a permit to discharge at Aberdeen had to be obtained, and therefore I do not think that the "delay occasioned in procuring a permit constituted a restraint of "princes within the meaning of the exception clause." (The other four members of the court decided the case on other grounds.) In *Safadi* v. *Western Assurance* [70] Roche J., in construing the clause in a policy "Trans-shipment if any . . . arising "from circumstances beyond the control of the assured," says: "There is a good deal of doctrine and authority to the effect that "you cannot apply language such as 'cause or circumstances "'beyond the control of the assured' to excuse performance "when those causes and circumstances and matters are represented by causes and circumstances and matters in existence "and known to be in existence by the person relying upon them "at the time he makes the contract from the performance of which "he seeks to be excused. . . . An illustration of the principle

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[65] (1921) 7 Ll.L.Rep. 248.
[66] 18 Com.Cas. 52.
[67] (1925) 23 Ll.L.Rep. 198.
[68] 1927 S.C. 891; 28 Ll.L.Rep. 329.
[69] [1915] 2 K.B. 774.
[70] (1933) 46 Ll.L.Rep. 140, 143 (col. 1).

"to which I am referring (it is only an illustration) is afforded by "the decision of Rowlatt J. in the case of *Ciampa*."[71] Finally, in *S.S. "Induna" Co. Ltd.* v. *British Phosphate Commissioners*[72] Sellers J., after reference to the decisions of Bailhache J. in *France Fenwick & Co.* v. *Spackman (Philip) & Sons*[73] and Rowlatt J. in *Ciampa*,[74] expressed the doubt[75] "whether either "learned judge was intending to lay down any general principle," and continued as follows: "In the present charterparty the parties "have made it clear that lay days are not to count where delay "in discharging arises by reason of a cause beyond the charterer's "control . . . The intention of the parties is clearly expressed. "If both of the parties or one of the parties knew at the time of "making the contract of existing circumstances which would or "might occasion delay, other considerations would arise, but "where neither party knew, as here, I see no reason why effect "should not be given to that which they have made clear by "their contracts. If parties are contracting on the basis of a "state of affairs known to them, or which it can be shown they "were prepared to accept, then an exception relating to something outside their control would, no doubt, be construed to "relate to some circumstances or event not so known or something outside the basis of their bargain, that is something "exceptional or abnormal in comparison with the contemplated "state of affairs."

Having considered these authorities I have come to the conclusion that there is no settled rule of construction that a specific exception, such as strikes or war, cannot be relied upon if the strike or war was operative at the time when the contract was made or the ship ordered to the affected port. Further, I find difficulty in seeing how knowledge of both or either parties can be material unless possibly upon the ground that all contracts must be construed in the light of surrounding circumstances. At the most, the authorities referred to decide that for a particular state of facts to amount to "restraint of princes" or "any cause "beyond the charterers' control," they must be exceptional or abnormal. I do not regard these authorities as entitling me or compelling me to hold that in clause 31 the word "strikes" must be read as "strikes coming into existence after the date of the "charterparty." To do so would be to write into the charterparty

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[71] [1915] 2 K.B. 774.

[72] [1949] 2 K.B. 430; 65 T.L.R. 149; [1949] 1 All E.R. 522.

[73] 18 Com.Cas. 52.

[74] [1915] 2 K.B. 774.

[75] [1949] 2 K.B. 430, 436.

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words which are not there, and which are not necessarily to be implied. Furthermore, in view of the peculiar nature of strikes, to which reference has been made in the cases cited earlier, it cannot be said in many cases, or, indeed, in any case, that the ship was doomed or that delay was inevitable. In addition, there are a great many cases, of which *Dobell & Co.* v. *Green & Co.*[76] (strike after charterparty but before nomination), *Leonis S.S. Co. Ltd.* v. *Joseph Rank Ltd.* (*No. 2*)[77] (strike before charter) and *Matheos* (*Owners*) v. *Louis Dreyfus & Co.*[78] (onset of ice reasonably to be anticipated) are examples, where, though the point was not taken, the decision was contrary to the application of the doctrine. Furthermore, I can see no justification at all for applying the doctrine to the *Queen City*, in which case the charterparty was entered into and the nomination made before the strike began, or for extending the doctrine in the case of the *Riverton* and *Cape Rodney* (where the charterparties were entered into before the strike) merely because the nomination was made after the strike began. In the case of the *Agostino Bertani*, whose charterparty was made after the strike, it seems to me to be quite inconceivable that the parties would have intended, and unreasonable that they should be deemed to have intended, to exclude the existing strike which might have ended at any moment and did, in fact, end within nine days of the vessel's arrival; and in the case of the *Moderator* there is a special clause restricting the right to send to strike-bound ports which is inconsistent with the application of the doctrine.

I, accordingly, reject this first argument raised on behalf of the shipowners.

The second main argument advanced on behalf of the ship (see II and (a), (b), (c), (d) and (e) above) was on the following lines which, for convenience of reference, I have again set out, viz.:

(a) that charterers are under an absolute obligation (i) to have sufficient cargo alongside the ship to start loading when she gives her notice of readiness, and to have made satisfactory arrangements for bringing the balance of the cargo down, and (ii) to load such cargo within the lay days subject to any relevant exceptions in the exceptions clause;

(b) that clause 31 does not qualify the absolute obligation to provide cargo but merely takes out from the lay-time any time by which the provision of cargo is delayed or the actual loading is delayed;

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[76] [1900] 1 Q.B. 526.

[77] 13 Com.Cas. 295.

[78] [1925] A.C. 654, 663; 41 T.L.R. 393.

(c) that even if clause 31 is to be regarded as qualifying the obligation to provide cargo, then inasmuch as the charterers elected to fulfil their obligation to provide cargo by contracting with the Canadian Wheat Board, who then became their agents or contractors, the charterers must show that they or the Canadian Wheat Board were delayed by excepted causes, which they cannot do as the delay was in fact caused by the action of the Board as agent for the charterers in giving preference to liners and withholding wheat for full cargoes from tramps;

(d) that, if the action taken in pursuance of the policy decision of the Wheat Board is to be considered as action taken by the Wheat Board in its official or executive capacity and not as agent or contractor for the charterers, the charterers cannot rely upon this policy decision as they took no steps to protest against it or to have it reversed;

(e) further or alternatively, that inasmuch as it was proved that there was at all times sufficient wheat in bulk in the non-strike-bound elevators to load any particular ship or (I think) all the ships with which these five actions are concerned, the charterers cannot bring themselves within the clause.

I have already held that on its true construction clause 31 does qualify the obligation to furnish cargo and to load the cargo to the extent of the proved delay by exempted causes. Furthermore, on the facts which I have set out above as to the constitution of the Board and the action taken by the Board through Mr. Smith, I consider and so hold that it would be artificial in the extreme and wrong to hold that the policy decision of the Board was an act done by the Board in its capacity as agent for the charterers. I hold that it was an executive action taken by the Board on behalf of Her Majesty in right of Canada and that, accordingly, the delay in bringing cargo down and in loading was from the point of view of the charterers delay caused by "force majeure" or "other hindrance of whatsoever nature "beyond the charterers' control." I further hold that this action being reasonable, it would have been unreasonable for the charterers to have attempted to obtain its reversal or modification. It was faintly argued that the decision of the Ministry of Food not to protest against the preference being given to liners was dictated by the financial consideration that it would cost the Ministry more in dead freight and/or detention if the liners were not so far as possible cleared. It is sufficient to say, having considered the booking notes, that there was no evidence in support of this suggestion and I reject it.

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The two cases mainly relied upon by counsel on behalf of the ships on this branch of his argument, more particularly on head (e), were *In re Richardsons & Samuel (M.) & Co.*[79] and *Central Argentine Railway Ltd.* v. *Marwood.*[80] In *In re Richardsons & Samuel (M.) & Co.*[81] the ship was chartered to proceed to Batoum and there load case oil from a named factory owned by Bnito at a specified rate per day. The charter excepted (inter alia) "strikes, lock-outs, accident to railway." The vessel was ready in berth to receive her cargo but owing to an accident on the railway by which oil was brought to Batoum, there was on that date no substantial quantity of oil at Bnito's factory or at Batoum. On April 14 oil began to flow and by April 16 there was sufficient oil at Bnito's factory for the work of filling the cases to be resumed on April 17. Bnito had, however, for their own purposes discharged the men engaged in filling cases when the oil flow ceased. After the oil started to flow again delay took place in filling the cases with oil and the vessel was delayed. Furthermore, two vessels which had arrived earlier were loaded in front of her. The Court of Appeal held that the delay from April 17 onward was not (i) caused by accident on railway, as there was sufficient oil at Bnito on April 17, and (ii) that the shortage of men for filling the cases was not within the expression "other "causes beyond the charterers' control" as the phrase had to be construed as ejusdem generis with "strikes and lock-outs." As it seems to me, it is only on the latter point that that case decides any point of principle.

In *Central Argentine Railway Ltd.* v. *Marwood*[82] the vessel was chartered to carry coals to Villa Constitucion. The charter provided as follows: "The cargo to be taken from alongside by "consignees at port of discharge . . . at the average rate of 200 "tons per day . . . In case of strikes . . . or any other causes "beyond the control of the consignees which prevents or delays "the discharging such time is not to count." On the vessel's arrival all the berths were occupied, and there was at the time a strike of stokers at the port. For the first 14 days after the ship's arrival no discharging was done at all; for the next 19 days there was a partial resumption of work and there were discharged from other ships 6,000 tons of coal equal to 6½ days' normal work. The charterers admitted that time started to count from the time when full working was resumed; the shipowners, however, claimed that they were entitled to count against the charterers the 6½ days above referred to, which the charterers claimed were lost by the strike. In the House of Lords the shipowners succeeded, and though the reasoning of their Lordships does not appear to me at least to be identical, I consider that the majority view was that, inasmuch as the 6½ days would have been lost by reason of the occupation of the berths by other ships, whether there had been a strike or not, it could not be said that these 6½ days were time lost by the strike. It is also to be observed that in that case, as in *Richardson's* case,[83] the concluding exception was "or any other cause or accident beyond the control of "charterers." It seems to me that the decision in *Marwood's* case [84] turned almost wholly on the proper appreciation of the facts as set out in a rather confused statement of facts, and that no general principle can be deduced from it, except that the mere existence of a strike is not sufficient; it must have some causative effect upon the operations of the particular ship concerned.

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[79] [1898] 1 Q.B. 261; 14 T.L.R. 5.

[80] [1915] A.C. 981.

[81] [1898] 1 Q.B. 261.

[82] [1915] A.C. 981.

I cannot find in either of these authorities any support for the proposition that because work was going on in the port of Vancouver throughout the strike, the charterers cannot rely upon or bring themselves within the exceptions clause.

Furthermore, it seems to me to be contrary to common sense. Suppose the charterer having 10 ships on charter for loading at a particular port at about the same time, the port facilities being such that, with cargoes available, 10 ships could be loaded at or about the same time and without undue delay, and suppose the charterer makes in advance proper arrangements to have cargo brought down sufficient to load the 10 ships in due time, but owing to exempted causes (e.g., accident on railways) only cargo sufficient for one ship can be made available. Can it be said that each ship could maintain that, as the charterers had sufficient cargo down to load the particular ship, the charterers cannot bring themselves within an exception clause such as this? I venture to think not, though counsel for the ships in the present cases frankly and logically submitted that the answer should be in the affirmative.

In my judgment, the answer to this apparent difficulty is to be found in the width of the exception clause in the present cases, and particularly the words "or any other hindrance of whatsoever "nature beyond the control of the charterers," and in the

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[83] [1898] 1 Q.B. 261.

[84] [1915] A.C. 981.

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construction which the courts have placed upon the words "hindering" or "hindrance."

In *Tennants (Lancashire) Ltd.* v. *C. S. Wilson & Co. Ltd.*[85] sellers who were importers of magnesium chloride agreed to sell to buyers their requirements of magnesium chloride over 1914 estimated at 400 to 600 tons. The contract provided that deliveries "may be suspended pending any contingency beyond the control "of the sellers . . . (such as . . . war . . .) causing a short supply of " . . . raw material or manufactured produce or otherwise preventing or hindering the manufacture or delivery of the article." The greater part of the supplies of magnesium chloride came from Germany. On August 4, 1914, on the outbreak of war, the sellers had 17 running contracts and the German source of supply was cut off. The sellers, though able at an increased price to obtain sufficient magnesium chloride to satisfy the particular buyers' contracts if they disregarded their other contracts and the normal requirements of their business, suspended delivery to these buyers. It was held in the House of Lords that the suspension was justified. Lord Loreburn[86] said that by hindering delivery was meant interposing obstacles which it would be really difficult to overcome, and said[86]: "To place a merchant in a position of "being unable to deliver unless he dislocates his business and "breaks his other contracts in order to fulfil one, surely hinders "delivery." Lord Dunedin said[87]: "They (the buyers) say, "however, that if (the sellers) had supplied them in preference "to all others, there would have been sufficient for them. It is "obvious that, if this is a good answer, each of the other contracting parties could have made it in turn, damages would have "been due to all and the clause would be no protection at all."

I was usefully referred to *Crawford & Rowat* v. *Wilson, Sons & Co.*,[88] in which similar principles were applied to a charterparty case. The facts are complicated. It is sufficient to say that the ship in question was chartered to deliver coal at R. "all unavoidable accidents or hindrances in . . . discharging cargo excepted." When the ship arrived at R. a rebellion was in progress and the ship, together with a number of other ships chartered by the defendants, was delayed. It was argued on behalf of the ship that, as they had succeeded in discharging 6,000 tons of cargo from other ships, they could have discharged the ship in question. This argument was rejected.

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[85] [1917] A.C. 495.

[86] Ibid. 510.

[87] Ibid. 515.

[88] (1896) 12 T.L.R. 170; 1 Com. Cas. 154, 277 (C.A.).

Lord Esher, affirming the judgment of Mathew J., states the ruling principle as follows[89]: "In my opinion, if by something "happening at the port of discharge which the defendant could "not possibly avoid, they could not take delivery without doing "something which it was wholly unreasonable that they should "be called upon to do, they would be hindered although by "doing the unreasonable thing they might possibly have taken "delivery."

This principle was applied by Scrutton L.J. in *Scheepvaart Maatschappij Gylsen* v. *North African Coaling Co.*,[90] in a sale of goods case; and in *Phosphate Mining Co.* v. *Rankin, Gilmour & Co.*[91] Bailhache J. paraphrased Lord Esher's judgment to fit the case before him in the words "if owing to an excepted peril the "defendants could not provide a steamer without doing something "which it was wholly unreasonable they should be called upon to "do, they would be prevented although by doing the unreasonable "thing they might possibly have provided the steamer," and described Lord Esher's principle as "the test which is now "always applied by the court to the problem presented by such a "case as this."

Applying that test to the facts of these cases, the strike having occurred without the fault of the charterers or the Canadian Wheat Board, and the policy decision taken by the Board having been found to be reasonable, there was in the case of each ship delay in bringing down the cargo and in loading the cargo by a hindrance outside their control, notwithstanding that possibly the charterers by taking the unreasonable course of persuading the Board to reverse their reasonable policy or, if the Board are to be regarded as the charterers' agent, the Wheat Board by reversing its reasonable policy, might have succeeded in loading all the wheat which was in fact loaded from the non-strike-bound elevators into the five vessels in question.

As stated above, 63,435 tons of wheat in bulk were loaded from the two non-strike-bound elevators. If all this wheat had been loaded into tramps as full cargoes, seven tramps would have been released. Assuming an average parcel of 2,000 tons, the policy adopted released 32 liners.

The conclusions I have reached on this branch of the case are, accordingly, as follows: (1) That the charterers are protected by the exception of strikes; (2) that, whether or not the Board is to be regarded as the charterers' agents, the charterers are protected

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[89] 1 Com.Cas. 277, 280.

[90] (1916) 85 L.J.K.B. 1386, 1389.

[91] (1916) 21 Com.Cas. 248, 251.

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by the exception of " any other hindrance of whatsoever nature " beyond the charterers' control "; (3) that, in fact, the Board was not the agent of the charterers in making and acting upon the policy decision, and that that policy being reasonable, it would have been unreasonable for the charterers to attempt to have that decision modified, and that they are protected by the exception of " force majeure " and the exception of " any other cause of whatsoever nature beyond the charterers' control."

III. I next turn to the question of the obligation to ship alternative cargoes if (contrary to the shipowners' submission) the charterers are entitled to the protection of clause 31 as regards the loading of wheat in bulk.

This question involves first difficult questions of law, viz.: (1) whether this court is bound by the decision of the Court of Appeal in *Brightman* v. *Bunge y Born*,[92] and (2) upon whom does the onus lie of proving that alternative cargoes could have been shipped and within what time, and, secondly, the examination of the evidence as to the availability of alternative cargoes.

It must be remembered that in the case of the *Queen City* and the *Cape Rodney*, the options were limited to one-third barley and one-third flour in bags; in the case of the *Riverton* the options were one-third barley and a full cargo of flour in bags; in the case of the *Agostino Bertani* and the *Moderator* there were no alternative cargo options. In no case was there an option to load wheat in bags beyond what was required for safe stowage.

In *Brightman* v. *Bunge y Born*[92] the appeal arose under the Centrecon form of charter. The charterers undertook to load a " full and complete cargo of wheat and/or maize and/or rye " at a certain specified rate, with an exception that " if the cargo " cannot be loaded by reason of riots, civil commotions or of a " strike or lock-out of any class of workmen essential to the " loading of the cargo or by reason of obstructions or stoppages " beyond the control of the charterers on the railways, or in the " docks, or other loading places . . . time for loading . . . shall not " count during the continuance of such causes." The charterers intended to load a cargo of wheat and had made arrangements to have it sent down from the interior by railway. A " ca-canny " movement on the railway delayed the flow of cargo and on the last day of the lay days a prohibition of export of wheat came into force. The Court of Appeal held (1) that the fact that the charterers had intended and made arrangements to load wheat did not amount to an election so as to convert the charter into a wheat charter; (2) that the charterers could not rely upon delay in bringing the cargo down to the port by reason of a "ca-canny" movement on the railway bringing the cargo down, *per* Bankes L.J. on the ground that it was not an obstruction, and *per* Scrutton and Atkin L.JJ. on the grounds that the exception of "obstruction" was limited to an obstruction preventing the loading of the cargo as distinguished from an obstruction preventing the cargo being brought down, and, further, that the phrase "obstruction on the railways" must be read as referring to the railways in the port directly connected with the process of loading; and (3) that though, when the prohibition of export of wheat came into force, the charterers became under an obligation to load maize or rye, they were not bound to load it immediately but were entitled to a reasonable time to see whether the prohibition would be lifted and to make arrangements for loading the substituted cargo, and to that extent they were excused from paying demurrage.

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[92] [1924] 2 K.B. 619.

On this case two points at the outset should be observed: (1) that the exceptions clause (corresponding to the present clause 31) was limited to events preventing loading stricto sensu; and (2) that the expression "the cargo" is twice used in the present clause and no reference is made to the "intended cargo."

The clause with which I am concerned differs from that clause in three significant respects: (1) that it extends the ambit of the exceptions to the process of the supply or bringing . . . to the port of loading or alongside of the cargo or the intended cargo or any part thereof; (2) that it expressly deals with both the cargo and the intended cargo, and (3) that it deals with delay, not prevention.

It may, of course, be said that the words "the intended "cargo" were added merely to cover the extension of the exceptions to the process of supply and bringing down, but in that case the words "the cargo" would not be necessary: see *per* Diplock J. in *South African Dispatch Line* v. *Niki* (*Owners*),[93] where an attempt to distinguish *Brightman's* case[94] failed. But here, as I believe for the first time, the court has to construe a clause in which both expressions "the cargo" and "intended "cargo" are used. In my judgment the clause in the present case covers two distinct events (subject to what is said below as to the effect of expressing the alternative cargo as an option),

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[93] [1959] 1 Q.B. 238, 250.

[94] [1924] 2 K.B. 619.

(1) delay affecting all kinds of contractual cargo, and (2) delay affecting the intended cargo. The effect is, in my judgment, that, if either of these events occurs, time is not to count during its continuance.

Furthermore, as it seems to me, there is a vital distinction between prevention by a prohibition of export, which for the time being at least involves a permanent and complete ban on loading, and delay by a strike which may or may not last long. Two further examples may be given: (i) ship loading grain in bulk, bad weather sets in; assuming that there is an alternative option to ship a cargo not affected by rain: must the charterer change over as soon as he can?; (ii) ship loading case goods by crane; crane breaks down but is repairable in 10 days: must charterer, having the option, change over to loading bulk grain by elevator?

There is, in my judgment, a further valid point of distinction between the two cases. In *Brightman's* case [94] (as appears from the charterparty in the House of Lords record) the cargo obligations were expressed as follows: clause 2: "steamer . . . to "proceed as ordered by the charterers . . . to the undermentioned "ports . . . and there receive from them a full and complete "cargo of wheat and/or maize and/or rye in bags and/or in "bulk."

By clause 5 the freight provided for was the same whatever the nature or composition of the cargo, though it varied with the place of loading and discharge.

By clause 6 (other cargo) it was provided that "the charterers "shall have the option of supplying other lawful merchandise . . . "in which case freight to be paid on steamer deadweight capacity "for wheat in bags."

In the present case, as stated above, the provisions as to alternative cargoes or part cargoes are expressly stated to be options to be exercised by the charterer, and the exercise of each of these options attracts an additional freight. For instance, the *Riverton* loaded 8,600 tons of wheat in bulk at 77s. 6d. per ton. There is no evidence either way to show whether, if the flour option had been exercised, she could have stowed 8,600 tons of flour in bags. But if she could, this would involve an additional freight liability of some £4,000. I find great difficulty in believing that by any process of implication it would be right or proper to impose this additional burden upon a charterer who had decided in his own mind to ship and had made arrangements to ship wheat in bulk.

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[94] [1924] 2 K.B. 619.

In my judgment, for the reasons stated, the ratio decidendi of *Brightman's* case [94] does not apply to the present cases, and not being bound by authority, I have reached the conclusion that once it is proved or admitted in each case (1) that the charterer did in fact intend to load wheat in bulk (as was admitted before me), and (2) that the supply or bringing to the port of loading or alongside the vessel or the loading of that intended cargo was delayed by the specific exceptions (as I have found), the clause operates and must be given its literal effect and that no obligation to exercise any of the alternative cargoes options is imposed on the charterers.

If, however, I be wrong in this conclusion, the next question is upon whom does the onus of proof lie to show that alternative cargoes could have been shipped and within what time. This problem is but lightly touched upon in *Brightman's* case.[94] Atkin L.J. alone [95] uses words which suggest that in his view the onus lies upon the charterer to show what amount of time he requires to change over. A somewhat similar matter was discussed in *Matheos (Owners)* v. *Louis Dreyfus & Co.*,[96] where Lord Sumner said: "It has been decided that when a prima facie case of "exempted peril is met by an allegation of negligence (*The Glen-*"*darroch* [97]) or unseaworthiness (*The Northumbria* [98]), the burden "of proof shifts to the party interested in establishing this allega-"tion affirmatively and I do not see why the same rule should "not apply to an allegation of the existence of a practicable "alternative mode of loading." Lord Dunedin, however, as I read his speech, deals with the problem rather differently where he said [99]: "But further I think that, once the proper and usual "mode of loading was negatived as rendered impossible by ice, "it really fell on the owners to get from the Umpire a finding "of commercial possibility, seeing that the possibility could only "rest on a novel and, so far as we can see, hitherto untried "method" (i.e., loading by manual labour). ". . . It is not "as if the alternative method to the usual method, which ex "hypothesi is found impracticable, is a usual one. Given impos-"sibility by crane I do not doubt it would be incumbent on the "charterer to prove impossibility by lighter. But this is quite "a different thing, unused, untried and problematical. In such "a case it seems to me the onus shifts and the owners, on whom "the shifted onus falls, have not discharged it."

[94] [1924] 2 K.B. 619.
[95] Ibid. 637.
[96] [1925] A.C. 654, 666.
[97] [1894] P. 226.
[98] [1906] P. 292.
[99] [1925] A.C. 654, 662.

On the whole, seeing that I am considering this problem on the hypothesis that the charterers have only succeeded for the time being in bringing themselves within the protection of the clause and remained under the burden of fulfilling their original obligation of loading a full and complete cargo, in my judgment the onus would remain upon them to show (1) that they required a reasonable time to change over, and (2) that if they had changed over, the delay would have been the same.

I now turn to the facts. I take first the case of the *Riverton*, which is the simplest case inasmuch as in that case there was an option to load a full cargo of flour. Flour is produced at the mills up-country from grain made available to the millers by the Canadian Wheat Board and is brought down to the loading port in bags and there loaded by longshoremen. The longshoremen were never on strike. It was agreed between the parties before me that the actual operation of loading would have taken four weather working days and it was assumed for the purpose of the argument that a full and complete cargo of flour would have amounted to about 9,000 tons. In 1953 the total exports of flour from British Columbian ports to the United Kingdom were of the order of 12,000 tons out of a total of 300,000 tons in all exported from British Columbia. Under their master contract with the Canadian Wheat Board the Ministry of Food were entitled to call for 350,000 tons of flour during the year from East and West Coast ports, but there was no evidence of how much of this had been shipped or how much from West Coast ports. My impression is that 12,000 tons above referred to represents the whole of the flour shipments from British Columbian ports by the Ministry of Food. The chief mills supplying flour for export from British Columbia were at the time very busy preparing shipments for the Orient and Philippines. Nevertheless I think that on the balance of the evidence, and so find, 9,000 tons of flour could have been made available at Vancouver in 30 days after the placing of the order by the Ministry of Food. (If there were competitive demands for flour for other earlier ships (the details of which are not before me) the period would have to be lengthened.)

I have set out above in my summary as to the facts of the strike the position at the time when the *Riverton* was ordered to Vancouver on March 22 and when she arrived on March 25. If my findings as to the likely duration of the strike are accurate, it would seem that it would be quite unreasonable to require the charterers to enter into arrangements for procuring a full cargo of flour which at best could not make the flour cargo available for a month. On the other hand, if the proper view of the facts is that at the time when the nomination of the *Riverton* was made on March 22 the strike was bound to last a very long time, it seems to me that the charterers on the hypothesis upon which this point is being considered ought to have started to make their alternative arrangements at least by that date: see *per* Diplock J. in *South African Dispatch Line* v. *Panamanian Niki* (*Owners*).[100]

As regards the other two vessels, the *Queen City* and the *Cape Rodney* with the one-third barley and one-third flour options, the factual position is as follows. As regards flour, I consider on the balance of the evidence that if each ship be considered in isolation, a parcel of flour equivalent to one-third of a full cargo could have been made available at Vancouver within 10 or 12 days of the placing of the order. As regards barley (which was under the same control by the Wheat Board as wheat) it appears that at the Midland Pacific elevator, which was not strike-bound, the barley stocks which stood at 12,383 bushels (about 340 tons) on February 17 had risen to 437,242 bushels (about 11,000 tons) by May 8, but according to Mr. Smith's recollection this barley had been sold elsewhere. This seems to be confirmed by the record of a shipment of 9,829 tons on *S.S. Illenao* for Japan after the strike. I think on balance of probabilities that no barley was in fact available for the Ministry of Food and that if a request for a part cargo of barley had been made by the Ministry of Food to the Board, it would not have been complied with.

Furthermore, seeing that the declared policy of the Board was to use the small quantity of wheat which could be shipped from the non-strike-bound elevators for liners in order to free them so far as possible, I am satisfied that the Board would not have made available wheat in bulk to the Ministry to complete a ship for which they had succeeded in getting one-third cargoes of barley and/or flour. It is true that the matter was never tested out, for the Ministry never made the request. I take the effect of a series of answers given by Mr. Smith to be that the ship having been tendered for a full cargo of wheat in bulk, he personally would not have agreed, and though he could not five years after the event definitely say what would have happened if the matter had been taken up at Ottawa, he did not think that he would have been overruled so as to permit parcel shipments of wheat into tramps, as this would be contrary to the policy adopted

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[100] [1959] 1 Q.B. 238, 253.

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by the Board. In so far as it is a question of fact for me, I find that parcel shipments of wheat to complete tramps which had tendered for full cargoes of wheat and had succeeded in getting part cargoes of barley or flour would not have been permitted.

It was also submitted on behalf of the ship that the charterers should have shipped at Vancouver wheat in bulk produced in those parts of British Columbia which lie outside the designated areas. In respect of the wheat so grown, the Canadian Wheat Board have not a monopoly of export though such wheat can only be exported by licence from the Board. The factual evidence as to the existence and availability of such British Columbian wheat is incomplete and confusing. It is agreed that in fact no such British Columbian wheat was in fact shipped in bulk, and in my judgment the fair conclusion on the evidence is that the only British Columbian wheat available for shipment during the strike period consisted of five shipments of bagged wheat (probably seed wheat) which was not a permitted cargo under the charterparties, and that, even if such British Columbian wheat had been available, it could not have been shipped from the two non-strike-bound elevators at Vancouver as these elevators were concentrating on obtaining bulk wheat to be loaded as liner parcels from their normal sources of supply and were fully occupied with such wheat.

Before considering the case of the *Moderator*, which in some respects stands by itself, it is convenient that I should deal with two independent points on the calculation of demurrage and dispatch common to all the four other cases which turn on (a) the meaning of " working " day and (b) the treatment of Saturdays.

As to (a), so far as this court is concerned it is agreed that by reason of the decision of the Court of Appeal in *Alvion Steamship Corporation of Panama* v. *Galban Lobo Trading Co. S.A. of Havana* [101] (to which I shall refer as the *Alvion* case), affirming a decision of my own, it is accepted that a " working day " is a length of time consisting of a number of hours which, according to the custom of the port, are usually worked at the port of discharge or loading, as the case may be, and the presence of the word " weather " qualifies " working day," so that from the number of hours which would be the ordinary hours of the port is to be deducted the length of time during which weather interferes with the " work ": see *per* Lord Goddard.[102] In the *Alvion* case [101] it was found that there was an established custom of the ports at Cardenas and Havana that the normal working periods were eight hours on weekdays other than Saturdays and four hours on Saturdays. On the facts here it is agreed that for Vancouver the normal working hours on weekdays other than Saturdays were eight hours. Accordingly, weekdays other than Saturdays must be taken as periods of eight hours each, from which must be deducted the number of hours, if any, during those working periods during which weather interferes with loading, or I think would have interfered with loading if loading had been in operation. (See the exception of "rainy days" in clause 15.)

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[101] [1955] 1 Q.B. 430; [1954] 2 W.L.R. 543; [1955] 1 All E.R. 457.

[102] [1955] 1 Q.B. 430, 449.

As to (b), the treatment of Saturdays, the position requires more detailed examination. By clause 15 of the charterparties (or clause 9 in the case of the *Moderator*) it was provided that six weather working lay days (Sundays, holidays and rainy days not to be counted as lay or working days) are to be allowed charterers for loading.

[His Lordship referred to the facts relating to "normal working hours" and the treatment of Saturdays, and continued:] On behalf of the ship it was argued (1) that ordinarily Saturday is not counted a holiday (see *Robert Dollar & Co.* v. *Blood, Holman & Co.*,[103] *per* McCardie J.), and (2) that on the facts Saturday in Vancouver is "*a* working day" and must be counted as such, or, alternatively, must be counted as half a day.

On the other hand, it was argued on behalf of the charterers that, so far as the loading of grain in bulk was concerned, Saturday is not a working day and should not be counted as a whole or part of a day.

The relevant authorities to which I was referred were as follows:

In *Robert Dollar & Co.* v. *Blood, Holman & Co.*[103] McCardie J. on a claim for discharge demurrage at Sharpness under a charter which provided that the vessel should "discharge afloat with "dispatch according to the custom at port of discharge but at "the rate of not less than 300 tons per working day" found that at Sharpness the usual working day was eight hours but only four hours were worked on Saturday, and held that Saturdays, though in practice only half days, counted as working days, citing in support Lord Sumner's speech in *Love & Stewart Ltd.* v. *Rowtor Steamship Co. Ltd.*,[104] where, however, there was an exception on Sundays, general or local holidays.

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[103] (1920) 4 Ll.L.Rep. 343, 350 (col. 1); 36 T.L.R. 843.

[104] [1916] 2 A.C. 527, 536

In "*Z*" *Steamship Co. Ltd.* v. *Amtorg New York*[105] Goddard J., on a charterparty which provided for discharge "at the "rate of 800 tons per weather working day, Sundays, official and "local holidays excepted," held obiter that Saturday, on which men worked at time and a half rates, was not an official or local holiday.

In addition, reference was made to the *Alvion* case,[106] where the umpire had left to the court the question whether, on the true construction of the charterparty and the weight of evidence, the charterers were correct in applying the principle of a day of eight hours and four hours on Saturday to their computation of laytime; but in that case the question I have to consider was not in issue in view of the exception of "Saturday afternoon."

In my judgment of the facts here proved and admitted, Saturday does not count either as a whole or half a working day. The issue must be determined with reference to the particular trade involved—in this case the loading of bulk grain from elevators. In that trade for one essential class, viz., the elevator men, Saturday did not form any part of their usual working hours any more than night work, for which time and a half was paid, or Sunday work, for which double time was paid, and the fact that, if required, they did in fact work on Saturday at time and a half rates, did not make Saturday part of their normal working week. I decide this point not by reason of the fact that Saturday is a holiday but on the ground that it is not a day which formed part of the usual working week of 40 hours.

Had I been of the contrary opinion on this point I should have held that Saturday morning should be counted as half a working day and that, if there had been rain for two hours during the working hours of Saturday morning, only a quarter of a weather working day would count. I would reject the contention that, if Saturday counted at all, the working week was a week of six working days consisting of eight hours each on Monday to Friday and four hours on Saturday. Neither the language used nor any authority cited leads to that result.

IV. I now turn to the case of the *Moderator*.

It will be recalled that this vessel was chartered by the Government of South Africa on April 2, 1953, viz., at a time when the strike, which had started on February 17, was still continuing. She gave notice of readiness on Saturday June 6 at 11.15 a.m., commenced loading on June 12 and completed loading on June 18. In the case of this vessel the range of loading ports was Vancouver/New Westminster or Victoria B.C., and the cargo to be loaded was a full and complete cargo of wheat, with no alternative cargo option. This charter did not, as did the others, contain the words " whether in berth or not," and it was not contended by the ship that, this being a berth charter, time could begin to count before 24 hours after she got into berth and gave notice of readiness. This she did at 8.20 a.m. on Friday June 12. The charterparty did, however, contain two relevant special clauses not present in the other cases, viz., clause 26: " Any time lost to the vessel by bad weather preventing discharge " . . . to be calculated on the basis of 24 hours at the ratio which " the actual time lost bears to the normal working hours of the " port "; and clause 36: " If the grain elevators at Vancouver " or New Westminster or Victoria B.C. are strike-bound when " vessel is seven days off Vancouver, this charterparty to be null " and void."

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[105] (1938) 61 Ll.L.Rep. 97; 54 T.L.R. 849, 850.

[106] [1955] 1 Q.B. 430.

Though in paragraphs 8 to 11 of the Reamended Points of Claim it was alleged that a fresh nomination of a loading port within the range should have been made in view of the fact that the port of Vancouver was congested, it was agreed before me by counsel for the ship that he could not claim that the nomination of Vancouver as a loading port was bad or that the vessel should have been switched to Victoria or New Westminster and that paragraphs 8 to 11 of the Reamended Points of Claim should be treated as withdrawn while still (as I understand him) relying upon the post-strike congestion as a material fact to be considered on other branches of the case.

The main point taken on behalf of the ship is to be found in paragraph 12 of the Reamended Points of Claim, which is in the following terms: " In further breach of their obligations under " the charterparty the defendants had no cargo available for the " vessel at any material time prior to June 11 or 12 and did not " make any contract for the acquisition of cargo until on or about " June 11 or 12, 1953. Further or in the alternative the defen" dants knew at the time they ordered the vessel to Vancouver " and at all material times thereafter that they had no cargo and " no contract for the acquisition thereof and no reasonable pros" pects of obtaining the necessary cargo at Vancouver within a " reasonable time."

In effect the ship claimed that, by reason of the charterers' failure to have cargo available on the ship's arrival, they prevented

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the ship from getting into berth at once. They relied in particular upon the two decisions of *Ardan Steamship Co.* v. *Andrew Weir & Co.*[107] and *Agrimpex Hungarian Trading Co. for Agricultural Products* v. *Sociedad Financiera de Bienes Raices S.A.*[108] (to which I shall refer as *The Aello*). The charterers by way of defence relied upon clause 18, which is in identical terms to clause 31 of the charterparty in the other cases, and on the facts which I have already dealt with in relation to the purchase of cargo from and control of cargo by the Canadian Wheat Board and the policy decision of the Board as to the use of the available wheat for the loading of parcels into liners and the postponement of tramp vessels tendering for full cargoes of wheat until the cessation of the strike which resulted in the congestion of the port with tramp vessels waiting to load wheat in bulk in the order of their arrival.

[His Lordship referred to the factual position as to provision of cargo and the nomination of the loading berth, and continued:] The facts stated in this letter [dated June 8, 1953, from the manager of the Canadian Wheat Board, Mr. Smith, to the charterers] were confirmed by Mr. Smith as being accurate, and I so find.

Consistently with my findings earlier in relation to the other cases, I also find that the master-contract of June 2, 1952, constituted a reasonable arrangement for making cargo available, that no wheat in bulk was available from any source other than the Canadian Wheat Board and that the Canadian Wheat Board in its control of the wheat in fact controlled the loading berths and did in fact nominate the loading berths, and, subject to the authorities to which I am about to refer, I also find that the application made to Mr. Smith for cargo and for a loading berth was the reasonable step for the charterers to take to obtain cargo for the ship under the master-contract and, indeed, was the only step they could take in the circumstances.

The extent of the congestion caused by the strike and continuing after the strike ended may be judged from the following figures: No less than 19 tramp vessels chartered by the three governments and arriving at Vancouver between February 16 and the end of April and six more arriving in May (after allowing for diversions to U.S. ports, cancellations and postponements) waited and ultimately loaded full cargoes of bulk wheat at New Westminster and Vancouver in order of their arrival, and, therefore, in turn before the *Moderator* (in addition to an unspecified number of tramps chartered by other persons); and after the strike ended on May 7 seven tramps chartered by persons other than the three governments loaded full cargoes of bulk wheat before the *Moderator*, being in turn before her. In addition, parcel shipments of bulk wheat were being made into liners.

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[107] [1905] A.C. 501; 21 T.L.R. 723.

[108] [1958] 2 Q.B. 385.

I now turn to *Ardan Steamship Co.* v. *Andrew Weir & Co.*[109] In that case the vessel was chartered to load a full and complete cargo of coals as ordered by charterers which they "bind them-"selves to ship (except in the event of riots, commotion by "keelmen, strike or lock-out of shippers' pitmen, or any hands "striking work, frosts or floods or any other accident or cause "beyond the control of the charterer which may delay the load-"ing." There was no provision as to the time within which the ship was to be loaded. In other words, the time for loading was a reasonable time. On June 9 the charterers ordered a cargo of coal from Lambton Colliery, Newcastle, intending to ship this on the chartered vessel. The chartered vessel arrived on July 14; two other vessels, having coaling orders from the same colliery, had arrived before her but did not complete until August 13, when the chartered vessel went into berth and began to load; but twice she had to leave berth, no coal being available, and she did not complete until August 23. The House of Lords, reversing the unanimous decision of the Inner House, restored the judgment of the Lord Ordinary, Lord Pearson, who had held that the delay complained of was caused not by the exceptional congestion of ships but by the failure of the (charterers) to perform their primary duty of providing a cargo and that there were no clauses in the charterparty which on a sound construction would excuse the respondent for the delay. Lord Halsbury[110] refers to "the absolute obligation to furnish the stipulated cargo" and observed "the delay in the loading is one thing and the failure to provide a cargo to load is another and very different thing." So, too, Lord Davey[111]: "There is nothing to be found in the "charterparty in the present case which in my opinion should "be held to qualify this absolute obligation of the charterers. "The exception of riots, etc., 'and other causes beyond the "'control of the charterer which may delay her loading' in my

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[109] [1905] A.C. 501.

[110] Ibid. 510.

[111] Ibid. 512.

"opinion applies only to the process of loading the cargo when "ready and not to delay in providing the cargo."

I have already observed earlier that the exception clause in these charterparties, including that of the *Moderator*, quite clearly applies to delay in the supply or bringing down of the cargo, and that, properly construed, the clause qualifies the absolute obligation to supply cargo for loading on the vessel's arrival to the extent of the delay arising from the excepted causes: see the observation of Denning J. in *Pinch and Simpson* v. *Harrison, Whitfield & Co.*[112]

In my judgment the case of *Ardan Steamship Co.* v. *Andrew Weir & Co.*[113] is no authority for the proposition that the charterers, having made proper arrangements for the supply and bringing down of the cargo, were in breach of their obligation as to the provision of cargo for the vessel.

In *The Aello* case [114] the one point which may be material in the present case was whether the charter being a "port" charter and the entry of the ship into the commercial area of the port so as to be an "arrived ship" not being possible until a cargo or part cargo was known to be available, the charterers were to be held liable for the failure of the ship to get into the commercial area of the port by not having cargo available. On this point Parker L.J. said this [115]: "Now it is true that in [*Ardan Steam-*"*ship Co.* v. *Andrew Weir & Co.*[116]] the ship had undoubtedly "got to the commercial area of the port and was only prevented "by the absence of cargo from getting a berth. Further, as Mr. "Roskill points out, there is no case in which it has been held "that a cargo must be ready to enable a ship to get into the "commercial area. However, bearing in mind that the charter-"party in the *Ardan* case [116] was a berth charterparty I should "have thought that the principle was plain, namely, that if the "provision of a cargo is necessary to enable the ship to perform "its obligation, namely, to become an arrived ship, the absolute "obligation of the shipper is to provide the cargo, or, at any rate, "a reasonable part of it, in time to enable the ship to perform "its obligation." It is to be observed, however, that the clause in *The Aello* [117] which corresponds to the present clause 18 is clause 30, which reads as follows: "If the cargo cannot be loaded "by reason of . . . obstruction or stoppages beyond the control

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[112] (1948) 81 Ll.L.Rep. 268, 273.

[113] [1905] A.C. 501.

[114] [1958] 2 Q.B. 385.

[115] Ibid. 404–405.

[116] [1905] A.C. 501.

[117] [1958] 2 Q.B. 385.

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"of the charterers." [118] There is no exception relating to the supply or bringing down of cargo. Furthermore, in both these cases it was the fact that, if cargo had been available, the ship could have become an "arrived ship" at once. But quite apart from these rather refined arguments I should have thought that the ordinary man approaching the problem "in a business sense" or "on common sense lines" would, if asked what prevented the *Moderator* starting to load on the date of her arrival, have said, and said truly: "The strike which, though it ended on May 7, "still had the result that the berths were congested by ships "held up by the strike and that cargo from the only available "source could not be made available to the ship until the earlier "ships had loaded."

I, accordingly, hold that the charterers were not in breach in either of the respects alleged in paragraph 12 of the Reamended Points of Claim.

If I had been of the contrary view, the damages on the authority of *The Aello* [119] would apparently have been assessed on the following basis: (1) the plaintiffs would be entitled to recover (a) any dispatch money to which they were liable on the facts as they existed, and (b) the demurrage to which they would have been entitled if the vessel had been able to get into berth on June 8. See Amended Particulars of Damage claimed under paragraph 12 of the Reamended Points of Claim.

There still remain certain points of detail as to the proper calculation of demurrage and dispatch in the case of the *Moderator*.

First, as to the meaning of "working day."

As regards the working day at Vancouver, this has, on the authority of *The Alvion* case,[120] to be calculated as a working day of eight hours for weekdays other than Saturdays. As regards Saturdays at Vancouver, what I have said above equally applies and Saturday does not count.

As regards the working day at the discharging port of East London, the position is complicated by the existence of a special clause as follows: "Clause 26. Any time lost to the vessel by "bad weather preventing discharge or the shifting as above to "be calculated on the basis of 24 hours at the ratio which the "actual time lost bears to the normal working hours of the port." This clause was introduced into this charterparty before the date of my decision in *The Alvion* case [120] (October 20, 1954), and is

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[118] [1958] 2 Q.B. 385; [1957] 3 All E.R. 627, 628.

[119] [1958] 2 Q.B. 385.

[120] [1955] 1 Q.B. 430.

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based upon the assumption, held by me and the Court of Appeal to be erroneous, that a working day is a period of 24 hours commencing either from the commencement of the work or from midnight on the first day. Though this assumption must now be taken to be erroneous in the absence of express or implied provision to that effect in the charterparty, I do not consider that it would be proper to disregard clause 26 altogether. In my judgment the effect of clause 26 is that by agreement between the parties the working day at the port of discharge is to be taken as a period of 24 hours running uninterruptedly from the moment when the time starts to count, with the following exceptions, viz.: (i) those contained in clause 22, i.e., (a) Sundays, (b) holidays, (c) "from noon on Saturday to 7.20 a.m. on the following "working day," and (ii) the exceptions contained in clause 26, i.e., (d) "any time lost to the vessel by bad weather preventing "discharge," or (e) "by shifting as above." As regards (d) and (e), the time lost is to be calculated at the ratio which the actual time lost bears to the normal working hours of the port. The normal working hours of the port on Monday to Friday are agreed to be 8 hours 40 minutes and on Saturdays 4 hours 40 minutes. Accordingly, if 4 hours 20 minutes are lost by bad weather or by shifting on a weekday, 12 hours only would be counted; if 2 hours 20 minutes are similarly lost by bad weather or by shifting on a Saturday, 6 hours only would be counted.

Finally, I have to consider the effect of clause 27, which provides that "loading and discharging time shall be reversible," and clause 17, which provides that "if charterers elect to treat "lay days in loading and discharging as per clause 17, despatch "or alternatively demurrage to be settled on completion of discharge. . . ." It is common ground that the charterers did so elect.

The effect of making lay days reversible has been considered in *Love & Stewart Ltd.* v. *Rowtor Steamship Co. Ltd.*,[121] *per* Lord Sumner; in *Verren* v. *Anglo-Dutch Brick Co. (1927) Ltd.*,[122] *per* Roche J., and in "*Z*" *Steamship Co. Ltd.* v. *Amtorg New York*,[123] *per* Goddard J. In *Rederiaktiebolaget Transatlantic* v. *Compagnie Française des Phosphates de l'Oceanie* [124] a clause to the effect that "any day or parts of days not consumed in loading "may be added to the time for discharging and any extra time

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[121] [1916] 2 A.C. 527, 536.

[122] (1929) 34 Ll.L.Rep. 56, 58; 45 T.L.R. 404.

[123] 61 Ll.L.Rep. 97, 102; 54 T.L.R. 849.

[124] (1926) 32 Com.Cas. 126.

"consumed in loading may be deducted from the time for discharging" was under consideration, and finally in *Alma S.S. Co. S.A.* v. *V. M. Salgaoncar e Irmaos* [125] Devlin J. had to consider the effect of a clause giving charterers the right "to average days allowed for loading and discharging." In the present case I have only to consider the effect of making the lay days reversible and need not express any opinion as to whether the same or different effect is produced by either of the other formulae.

On the authorities cited as to reversible lay days and in principle it seems to me that where, as here, dispatch is payable on "time saved including Sundays and holidays," the result is as follows: First you ascertain the number of days of the particular quality specified in the charter which are allowed for loading and for discharging, which days so ascertained form a pool. For example, eight weather working days for loading; 12 weather working days for discharging; total 20 weather working days. If at the loading port less than the quantity of days allowed for loading has been used, the balance of the days of that quality, say three weather working days, is carried forward to the discharging port, or if more than the number of such days have been used for loading, you draw on the days of that quality available for discharge to meet the excess, with the result that there are fewer days of that quality (say 12 days less 5) left for discharging. Finally, you ascertain how many days of the specified quality have been used at the discharging port; if the days so used exceed the number of days available for discharge whether that number has been increased (i.e., 12 plus 3) or diminished (i.e., 12 minus 5) demurrage is payable on such excess; but, if the days so used are less than the number of days available for discharge, whether that number has been increased or diminished. dispatch money is payable on the number of days of that quality by which the days used is less than the number of days of that quality available. For the purpose of this calculation the factor that the working day is a period of eight hours at the loading port and a period of 24 hours at the discharging port is only brought into play in determining how many working days or parts have been used at the loading and discharging port respectively. What is carried forward or drawn on is a number of weather working days or parts of such days.

I have not attempted in this judgment to quantify the result of my findings in any of the cases in terms of demurrage or dispatch money, it having been agreed before me by counsel that the parties would attempt to reach agreement on the question of quantification on the basis of my findings.

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[125] [1954] 2 Q.B. 94.

Finally, while I am conscious that I have not in this judgment—already over-long—dealt with all the arguments addressed to me with their numerous supporting authorities in addition to those to which I have referred, I desire to express to counsel my great indebtedness for the assistance I have received, and for their readiness to agree certain facts where agreement has been possible.

Judgment for the charterers on claim and counterclaim with costs was entered on October 15.

Solicitors: *Richards, Butler & Co.; Treasury Solicitor; William A. Crump & Son; Jaques & Co.*

C. A.

1959
Nov. 10, 11, 12; *Dec.* 18.

Hodson and Ormerod L.JJ. and Gorman J.

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Shipping—Charterparty—Demurrage—Exceptions clause—Charterparty providing for shipment of wide variety of cargo in Coos Bay/British Columbia range—Exceptions clause excusing charterers from "any "delay if the cargo intended for shipment . . . cannot be . . . loaded ". . . by reason of . . . strikes . . ."—Strike preventing loading of intended cargo of lumber—Extent of delay covered by clause—Charterers' duty to provide alternative cargo within reasonable time —Meaning of "cargo, the"—Intended cargo.

Ships' Names—Niki.

Election or Option — Election or selection — Charterparty — Alternative cargoes.

A single voyage charterparty provided for shipment in four districts in the Coos Bay/British Columbia range, loading rotation to be at the charterers' option, of a cargo of lumber and/or timber and/or wheat in bulk and/or lawful merchandise, excluding dangerous cargo. The charterparty contained an exceptions clause providing: ". . . Charterers shall not be responsible for any delay if "the cargo intended for shipment under this charterparty cannot "be provided, delivered, loaded or discharged by reason of . . . "strikes . . . connected in any way with, or essential to the pro- "viding, delivery, loading or discharging of the cargo . . ."

On June 13, 1952, the charterers booked a cargo of lumber at Victoria, British Columbia, intending on that day to order the ship first to Vancouver to load wheat, thence to Victoria to load the lumber, and thereafter to two American ports to complete loading, but on June 16 a strike broke out which prevented the loading of lumber at all British Columbia ports. On June 27, as the strike still continued, the charterers proposed to the owners a variation in the rotation and the loading of an alternative cargo of wheat if it proved impossible to load the lumber because of the strike, and, as the owners agreed, the ship, instead of calling at Victoria to load the lumber, took on a further cargo of wheat at Vancouver and sailed direct to Portland, Oregon, where she completed loading on July 31. The owners would not agree to compensate the charterers for the cost of loading the alternative cargo and rearranging the rotation, as they contended that if the vessel had gone to Victoria to load the lumber, the laydays would have begun to run irrespective of the strike.

The issue whether the owners would have been allowed to count time lost at Victoria because of the strike as laytime if the vessel had loaded the intended cargo was referred to arbitration, and the umpire, holding that the charterers would have been protected by the exceptions clause from responsibility for delay in loading caused by the strike, made his award in their favour.

On appeal, Diplock J. gave judgment for the owners. On appeal by the charterers:—

Held, that in the case of a fixed laytime charterparty which imposed on the charterers a duty to load and discharge within the fixed time a wide range of lawful merchandise such as they might select, such an exceptions clause did not exempt the charterers from seeking an alternative cargo when one cargo became unavailable owing to an excepted peril, but merely excused delay in loading for such time as was reasonably required to obtain the alternative cargo (post, pp. 530, 534, 536). Accordingly, in the circumstances, the charterers would not have been entitled to send the ship to Victoria and to count as laytime an indefinite period of waiting until a cargo of lumber became available, and the shipowners were therefore entitled to succeed.

Bunge y Born Limitada Sociedad v. *Brightman & Co.* [1925] A.C. 799; 41 T.L.R. 652; [1924] 2 K.B. 619; 40 T.L.R. 876 applied.

Decision of Diplock J. [1959] 1 Q.B. 238; [1958] 3 W.L.R. 718; [1958] 3 All E.R. 590 affirmed.

Appeal from Diplock J.

A dispute arose between the owners of the Panamanian Steamship *Niki* and South African Dispatch Line, charterers of the ship, in connection with a charterparty dated June 3, 1952, for a single voyage for a lump sum freight of 185,000 dollars. The dispute was submitted to arbitration in accordance with clause 32 of the charter and an umpire gave his award in the form of a special case.

Under the terms of the charterparty the *Niki* was to proceed for shipment to four districts "in Coos Bay/British Columbia "Range within British Institute Warranty limits . . . maximum "six berths; as ordered by charterers, loading rotation to be "North/South or South/North at charterers' option, with "charterers' option of commencing loading on the Columbia "River or Coos Bay, then British Columbia, thence South to "Columbia River to complete . . ." and a wide range of alternative rotations was provided for. Orders for first loading were to be given by wireless on Captain's application four days before due off Estevan wireless station, and the cargo to be loaded was "a full and complete cargo of lumber and/or timber and/or wood "goods and/or wheat in bulk and/or lawful merchandise, excluding dangerous cargo and explosives . . ." for shipment to "four "safe ports in Cape Town/Lourenço Marques range . . ."

Clause 4 (the exceptions clause) provided: " . . . Charterers "shall not be responsible for any delay if the cargo intended for "shipment under this charterparty cannot be provided, delivered, "loaded or discharged by reason of . . . strikes or lock-outs of "any class of workmen or stoppage of labour connected in any "way with, or essential to the providing, delivery, loading or "discharging of the cargo . . ."

By clause 7 cargo was to be loaded in 14 weather working days, laydays at first loading port to commence 24 hours after receipt of notice of readiness to load, and there were similar provisions for subsequent loading ports. Clause 8 provided for 25 days discharging time and by clause 9 loading and discharging time were to be reversible. Clause 23 provided that laydays were not to commence before July 25 and the cancelling date was July 19.

According to an agreed statement of facts annexed to the special case, on June 13, 1952, the charterers booked 540 mille lumber for shipment at Victoria, British Columbia. They had certain prior commitments and their intention on and after June 13 was to load the following cargo on the *Niki* under the charterparty: at Vancouver—4,050 tons wheat; at Victoria—540 mille lumber; and at Coos Bay, and thereafter at Portland, Oregon, U.S.A., to complete with lumber from two other shippers.

On June 16, 1952, a strike of lumbermen broke out in British Columbia which prevented the loading of timber in British Columbia ports. The strike did not affect any United States ports or places within the charter loading range nor did it prevent or delay the loading of wheat in bulk and/or other lawful merchandise at any British Columbia and United States ports or places within the charter loading range. The charterers were in fact able to load 4,900 tons of wheat at Vancouver after the outbreak of the strike had prevented their loading lumber. The strike continued until July 30, 1952.

Meanwhile, on June 27 the charterers exercised their option and declared to the owners their intention to load in the rotation wheat at Vancouver, lumber at Victoria, and thereafter at Coos Bay and Portland, but in view of the position of the strike on that day they cabled the owners proposing a variation in the rotation. That was in the following terms: "*Niki* now dry-docked "Victoria understand ready to load July 1 Vancouver. Present "itinerary 4,050 tons wheat Vancouver 540 lumber Victoria "thence Coos Portland. 540 mille Victoria subject indefinite "delay account Canadian mill strike. Therefore we make owners "following proposal. Will commence Coos first loading district "then British Columbia completing Portland. If 540 mille "Victoria still unready due strike will take 4,900 tons wheat "provided owners allow 11,000 dollars for loss revenue and cost "restowing lumber."

The owners took the view that under the terms of the charterparty the vessel was not obliged to wait even a reasonable time at Victoria for the 540 mille lumber intended for shipment and that the charterers' proposal was unacceptable. After a number of communications had passed between the parties, on July 6 the charterers cabled the following proposal: "We without pre-"judice propose to submit to arbitration the issue whether "owners allowed to count time lost Victoria because of strike "as laytime if vessel loads intended cargo. If owners' contention "correct owners should not compensate charterers for alternative "cargo and cost re-arranging rotation. If owners' contention "wrong owners to pay for expense of bagging 500 tons of grain "and loss of revenue from shipment of grain instead of Victoria "lumber." The owners agreed to submit the issue stated to arbitration and thereupon the alternative rotation was adopted and the alternative cargo of wheat carried.

Whilst the negotiations were proceeding the *Niki* had, in accordance with the charter provisions, proceeded to Vancouver, where notice of readiness was given and accepted on July 2. The ship loaded 4,900 tons of wheat at Vancouver between July 2 and 9, on which day she sailed for Coos Bay, where she loaded

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lumber, sailing thence to Oregon to complete loading. The total time used for loading was 15 days and 13 hours 50 minutes. The charterers deducted 11,000 dollars from the freight paid, and that sum was placed on escrow in the hands of agents in New York to await the decision of the arbitrator.

The 540 mille lumber which the charterers declared they intended to ship at Victoria was not identified in the sense that it had been separated out and marked for shipment in the *Niki*. It was not customary to separate, mark or identify lumber for loading in any particular vessel until shortly before the lumber was in fact loaded on the vessel, and there would have been no difficulty or delay about the loading of the lumber if the strike had not occurred.

Before the umpire the charterers contended that at the time they made the booking for the 540 mille lumber, no strike was in existence, nor was a strike inevitable, and they did not and could not know the likely duration of any strike that might thereafter occur; that if the lumber had been loaded, clause 4 of the charterparty would have protected them from responsibility for any delay in the loading thereof caused by the strike and, accordingly, they were entitled to have the 11,000 dollars released to them.

The owners contended, inter alia, that at the time the charterers contended that they had booked the lumber the strike was inevitable and was likely to be of considerable duration; that they must be deemed at that time to have had knowledge of the inevitability and duration of the strike; that therefore clause 4 would not have protected the charterers from delay in loading caused by the strike if the lumber had in fact been loaded and, accordingly, they were entitled to the 11,000 dollars.

The umpire found, in so far as they were questions of fact, and held, in so far as they were questions of law, that on June 13, 1952, and for some days prior thereto it was probable that the strike would break out shortly after June 14 but that it was not inevitable; that on June 13 no reliable forecast could be made of the likely duration of the strike if it were to break out; that on that date the charterers must be deemed to have had knowledge that the strike was probable but not that it was inevitable and they could not be deemed to have had prior knowledge of its likely duration. If the 540 mille lumber had been loaded, clause 4 would in the circumstances have protected the charterers from responsibility towards the owners for any delay in the loading thereof caused by the strike and the owners would not have been able to count time lost because of the strike as laytime.

Accordingly, he awarded that the charterers were entitled to have released to them the 11,000 dollars, subject to the opinion of the court on the question whether, on the facts agreed and found, they were so entitled. If the question were answered in the affirmative, his award should stand. If it were answered in the negative, then in lieu of that award the owners would be entitled to have the 11,000 dollars released to them.

On appeal, Diplock J. reversed the award and gave judgment for the shipowners. The charterers appealed.

Michael Kerr for the charterers. The issue is whether, if the ship had gone to Victoria to load lumber, as intended by the charterers on June 27, the time of waiting until the strike ended and the lumber could be loaded could count as laytime. That depends on the protection afforded by clause 4. The charterers must show what the "intended cargo" was, and that it could not be loaded because of the strike; there are clear findings that the intended cargo was lumber, which could not be loaded because of the strike. The owners cannot succeed unless they can establish that clause 4 does not apply, as by its plain terms it excuses the charterers.

The owners relied below on *Bunge y Born Limitada Sociedad* v. *Brightman & Co.*,[1] but that case lays down no general principle, and a case dealing with one charterparty is no authority for the construction of another: *Evera S.A. Comercial* v. *North Shipping Co.*[2] [*Owners of the Steamships Ardgowan, Ardgoil and Buranda* v. *Royal Commission on Wheat Supplies*[3] was also referred to.] The *Brightman* case[4] is quite distinguishable. There the exceptions clause protected the charterers "if the "cargo," not "the intended cargo," "cannot be loaded by "reason of obstruction beyond the control of the charterers or "the railways," and the real reason for the failure to load was not difficulties on the railways but the prohibition of export. The exceptions clause in that case did not protect a charterer who had selected a cargo, because he had a choice; if one cargo became unavailable he had to load something else if possible; that case was concerned with impossibility, while in this case the charterers are protected if the loading of the cargo which they had selected is delayed. By clause 1 the charterers are to load "a full and "complete cargo" and have the right to select what it shall be;

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[1] [1925] A.C. 799; 41 T.L.R. 652; [1924] 2 K.B. 619; 40 T.L.R. 876.

[2] [1956] 2 Lloyd's Rep. 367.

[3] (1923) 15 Ll.L.Rep. 86.

[4] [1925] A.C. 799; [1924] 2 K.B. 619.

accordingly, "the intended cargo" in clause 4 must be given a narrower meaning, and refers only to the cargo selected by the charterers.

A case much closer to this is *Reardon Smith Line Ltd.* v. *Ministry of Agriculture, Fisheries and Food*[5]; there was a choice of cargoes, and the exceptions clause protected the charterers if "loading of the cargo or the intended cargo" was delayed by a strike. McNair J. distinguished *Brightman's* case and held that there was no obligation on the charterers to exercise their option to load another cargo once it was proved that they intended to load a particular cargo; that was also a case where the exceptions clause dealt with delay, whereas in *Brightman's* case it dealt with impossibility.

The word "cargo" is often used of goods which are prospective cargo, goods which the charterers must tender and the owners must load, in this case wood goods, wheat in bulk or lawful merchandise. But "cargo intended for shipment" in clause 4 must have a narrower meaning. The clause is inserted to protect the charterers, and it is not right to regard them as having to switch, a course which may be commercially disastrous. The intended cargo is that which the charterers have earmarked and designated for the particular voyage. [*Quinn* v. *Leathem*[6] and *Pinch and Simpson* v. *Harrison*[7] were referred to.]

If the charterers' contention is not accepted, the case should be remitted to find out what allowance should be made for the time necessary to provide an alternative cargo; there should be an opportunity to produce evidence regarding the availability of alternative cargoes.

R. A. MacCrindle for the owners. This is a fixed laytime charterparty and the principles applicable are plain. The charterers are under an absolute duty to load and discharge within the fixed times, subject to any exceptions applicable. The cargo applicable is not lumber only but any lawful merchandise which is not dangerous. Therefore, in the absence of express provision to the contrary, the charterers' duty is to load a full and complete cargo in due time out of the permissible range. If they find themselves unable to load one type, they must load another; the exceptions clause can be construed only against the background of such obligations. The facts show that any cargo except lumber could have been loaded at Victoria or elsewhere in British Columbia.

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[5] Ante, p. 439; [1959] 3 W.L.R. 665; [1959] 3 All E.R. 434.

[6] [1901] A.C. 495; 17 T.L.R. 749.

[7] (1948) 81 Ll.L.Rep. 268.

On the construction of clause 4, the charterers' contentions would impose extravagant risks on the owners; the delay in getting half a ton of cargo would excuse the payment of demurrage. "Delay" means a delay in the performance of obligations for which the charterers would otherwise be liable—in the present case the relevant obligation is to load a full and complete cargo of *any* kind within the range of lawful merchandise stated in clause 1; if the cargo originally contemplated is not available, the charterers must act reasonably and quickly in finding a substitute, and are protected to that extent. The word "if" in clause 4 has a causal significance; the delay must be caused by the excepted peril.

The expression "cargo intended for shipment" can mean the wide range specified in clause 1 contemplated by both parties, or it may be mere surplusage: see *Royal Greek Government* v. *Ministry of Transport (No. 2)*.[8] If the "intended cargo" has the meaning contended for by the charterers, the only material delay is that imposed by the necessity to find another cargo: see *per* Scrutton L.J. in *Brightman's* case.[9] The judge was right in applying *Brightman's* case,[10] the reasoning of which is wholly applicable.

If, as is submitted, there is a duty to obtain another cargo, delay by the charterers is self-induced after a reasonable time has expired to enable them to switch to another cargo, the direct cause of any delay after the expiry of that time being the adherence of the charterers to their original choice, and not the excepted peril, so that the exceptions clause has no application. [*Brown* v. *Turner, Brightman & Co.*[11] was referred to.] The charterers have sought to rely on the *Reardon Smith* case,[12] which also dealt with the situation arising from a strike in British Columbia, but it is submitted that the relevant clause in that case was different —there periods of time defined by reference to inability to load an intended cargo were excluded from the laytime; the present clause is an exception clause, not definitive of the laytime available, but dependent for its operation upon proof of a causal connection between the excepted perils and delay in loading the charterparty cargo. We are here concerned to find whether there was any delay in loading the *charterparty* cargo caused by the fact that the *intended* cargo could not be loaded owing to strikes. *Brightman's* case [13] is closer to the present one and governs it.

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[8] (1949) 66 T.L.R. (Pt. 1) 504.

[9] [1924] 2 K.B. 619, 630.

[10] [1925] A.C. 799; [1924] 2 K.B. 619.

[11] [1912] A.C. 12.

[12] Ante, p. 439; [1959] 3 W.L.R. 665.

It has been suggested that, if the owners are right, the case should be remitted to ascertain what reasonable time the charterers should be allowed in which to find an alternative cargo. There is no jurisdiction to do that as that point was never before the umpire, and his findings define the issues in such a way as to preclude any such question. If there is any discretion in the matter, the time now is far too late. The parties made their bargain of 11,000 dollars, without any reference to demurrage, on the basis of loss of profit and cost of stowage. It is useless to determine what is a reasonable time for doing something when the party responsible never did it and never intended to do it.

Kerr in reply. The cargo "intended for shipment" must mean the cargo intended by the charterers and not by the parties. If it does not mean intended by the charterers, the exceptions clause could hardly operate at all unless there was a general dock strike in the loading area; the range of permitted cargo is so wide that there would be no protection for the charterers.

Owners of Steamship Matheos v. *Louis Dreyfus & Co.*,[14] *Bulman & Dickson* v. *Fenwick & Co.*[15] and *Dobell* v. *Green* [16] show that, in the circumstances, the charterers were entitled, as they did, to select a cargo of lumber, and would have been entitled to order the vessel to Victoria, notwithstanding the strike; when selecting a port of loading, a charterer in such circumstances is not obliged to alter his option but can rely on the exceptions clause.

As to remission, the question always is whether the court can do justice between the parties on the facts found, or whether further facts are necessary. There is complete discretion, because it is a question of fairness in every case. It seems that both parties are agreed that there should be a reasonable time for switching the cargoes, and the court is entitled to know what that time was.

MacCrindle replying on the cases. One must distinguish between an irrevocable election (such as choice of a berth for loading) and a selection which is not irrevocable and does not become written into the contract, but leaves it open to the party to change his mind. The cases cited concern the rights of a charterer to order a vessel to a particular port for loading or discharging; such a choice may well be an irrevocable election binding on the parties. But the right to choose between an extensive range of permissible cargoes is never irrevocable and does not become written into the contract. [*Fitzgerald* v. *Lona* (*Owners*)[17] was referred to.]

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[13] [1925] A.C. 799; [1924] 2 K.B. 619.

[14] [1925] A.C. 654; 41 T.L.R. 393.

[15] [1894] 1 Q.B. 179; 10 T.L.R. 45.

[16] [1900] 1 Q.B. 526; 16 T.L.R. 504.

Cur. adv. vult.

Dec. 18. The following judgments were read.

HODSON L.J. This is an appeal by charterers from a decision of Diplock J. given on November 13, 1958, upon a special case stated by a commercial umpire arising out of the lumber strike in British Columbia in 1952. The case raises a question of the constructions of an exceptions clause in a charterparty of which the relevant words are: "Charterers shall not be responsible for "any delay if the cargo intended for shipment under this charter-"party cannot be provided, delivered, loaded or discharged by "reason of . . . strikes or lock-outs of any class of workmen or stop-"page of labour connected in any way with, or essential to the "providing, delivery, loading or discharging of the cargo." The remaining relevant clauses of the charterparty, and the facts as found by the special case, are set out in the introduction to the judgment of the judge reported in Law Reports,[1] and need not be repeated. Suffice it to say that the dispute referred to arbitration was the detention of 11,000 dollars which the charterers deducted from the freight paid and placed on escrow in the hands of agents in New York to await decision of the arbitrator.

This deduction of 11,000 dollars followed communications passing between the owners and the charterers which read as follows. June 27. Charterers to owners. "*Niki* now dry-docked "Victoria understand ready to load July 1 Vancouver. Present "itinerary 4,050 tons wheat Vancouver 540 lumber Victoria "thence Coos Portland. 540 mille Victoria subject indefinite "delay account Canadian mill strike. Therefore we make owners "following proposal. Will commence Coos first loading district "then British Columbia completing Portland. If 540 mille "Victoria still unready due strike will take 4,900 tons wheat "provided owners allow 11,000 dollars for loss revenue and cost "restowing lumber." July 6. Charterers to owners: "We "without prejudice propose to submit to arbitration the issue "whether owners allowed count time lost Victoria because of

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[17] (1932) 49 T.L.R. 77.

[1] [1959] 1 Q.B. 248; [1958] 3 W.L.R. 718; [1958] 3 All E.R. 590.

"strike as laytime if vessel loads intended cargo. If owners' "contention correct owners should not compensate charterers for "alternative cargo and cost re-arranging rotation. If owners' "contention wrong owners to pay for expense of bagging 500 tons "of grain and loss of revenue from shipment of grain instead of "Victoria lumber." The owners agreed to submit the issue stated to arbitration, and the main contentions before the umpire and the judge were to the effect, on the part of the owners, that they were entitled to the 11,000 dollars under the charterparty, and on behalf of the charterers that they were protected by the exceptions clause on the footing that if the lumber had been loaded, clause 4 of the charterparty would have protected them from responsibility for delay in the loading thereof caused by the strike, and, accordingly, they were entitled to have the 11,000 dollars released to them.

The argument of the charterers is simple and direct. It is that on the hypothesis which the court is asked to assume the meaning of clause 4 is clear, and that, in order to decide whether it applies in the present case, two facts must be ascertained: (1) What is the intended cargo under this charterparty? (2) Did the strike prevent that intended cargo being loaded? It is said that there is no doubt on the facts found (1) that the intended cargo was the 540 mille lumber which the charterers had booked at Victoria, and (2) that the strike of lumbermen prevented it from being loaded. This being so, it is said that delay in loading the cargo intended for shipment is excused by clause 4 because the clause expressly says so. Accordingly, it is said that if the charterers provided the cargo intended for shipment, and it cannot be loaded because of the strike, they are entitled to keep the ship waiting for the strike to end, subject only to frustration of the charterparty.

The argument of the charterers is at first sight attractive, but the exceptions clause must be considered against the background of the charterparty as a whole, and the obligations of the charterers contained therein. The charterparty is a fixed-laytime charterparty which imposes on the charterers a duty to load and discharge in the fixed time subject only to any exception within which they can bring themselves, otherwise they must pay demurrage. The charterparty is not one to load lumber. The charterers could have loaded any lawful merchandise except dangerous cargo, and certain other named goods. The charterparty is not converted into a contract of affreightment for a particular commodity by the nomination of that commodity. The right to nominate carries with it the duty to load a full and complete cargo of one of the range so that, if the charterer cannot load one he has intended to load, prima facie, he has to load some other cargo out of the range. So far as the facts of this case are concerned, the strike at Victoria did not affect other merchandise, and the charterer has a right (though it may be in a given case unprofitable) to change his mind and switch to another cargo.

The delay in clause 4 is delay in the performance of the obligation which, under this charterparty, is an obligation to provide any number of alternative cargoes. The judge said, and I respectfully agree [2]: "If, therefore, the particular cargo in this case, "timber, could not be provided, the charterers were under a duty "to provide another. Their inability to provide the intended "cargo may result, and would result, in their acquiring a reasonable time to make alternative arrangements to provide another "cargo; but it seems to me that that, and that only, is the extent "of the delay caused by a strike affecting only one of the alternative cargoes which the charterer is entitled, and indeed under "a duty, to supply. In this case the strike affected only timber "or lumber. It did not affect wheat or any other of the cargoes "concerned."

I accept the owners' contention that the word "if" has a causal significance, and is equivalent to "caused by the fact "that" rather than equivalent to "so long as," as the charterers contend.

The charterers contend that the words "intended for shipment" following the word "cargo" must show that they are covered by the exception, because it is defined as the cargo fixed on June 13; but cargo "intended for shipment," whether it relates to the cargo fixed on June 13, or any other goods mentioned in clause 1, does no more than extend the word "cargo" from its limited meaning of goods carried on board to something which is going to become cargo when it arrives on board.

It is unnecessary to speculate why the word "intended" was inserted before the word "cargo." It may well have been for the reason given by Diplock J., but it does not, in my view, have the effect contended for by the charterers, that if the cargo fixed on June 13 is delayed by a strike, they are entitled to sit with folded arms until the strike ends. The question must always be what is the delay which flowed from the inability to load the lumber, and the answer given by the judge is, in my judgment, correct, namely, the delay involved in switching to another cargo within the range. There is nothing in the exceptions clause which exempts the charterer from the duty to look for alternative cargo. If that were so, he would be protected by his exception clause from a breach of his duty when other cargoes are available, and not only in respect of one particular cargo.

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[2] [1959] 1 Q.B. 238, 249.

If this is correct, there would, of course, have been a necessity, if the vessel had gone to Victoria, to consider what protection is given by the exceptions clause in respect of the particular delay with which we are concerned.

The charterers' duty would be to make preliminary arrangements, as the judge said, before they sent the ship to Victoria if there was a reasonable likelihood of the strike continuing when the vessel arrived, and to make definite arrangements as soon as it was clear that it would continue. I agree with the judge that they would then be entitled to a reasonable time to make those arrangements.

This seems to me to follow from the reasoning of the judgments in the Court of Appeal in *Brightman & Co.* v. *Bunge y Born Limitada Sociedad*,[3] and by the opinion given by Lord Atkinson in the House of Lords in the same case.[4] Subject to Lord Dunedin's reservations,[5] this case supports the view that where a charterparty permits the loading of a selection of different cargoes, the fact that the exceptions clause would excuse delay in loading one type of cargo does not excuse a failure to load an alternative type of cargo, the loading of which is not affected by an excepted peril, and that, in such a case, the exceptions clause does excuse delay in loading for such time as is reasonably required for the charterers to obtain an alternative cargo.

It is true that in *Bunge's* case the particular question before this court was not decided, since the decision did not turn upon the construction of an exceptions clause, but upon the effect of a prohibition which prevented the loading of a particular cargo out of a range, and the word "cargo" was not, as here, preceded by the word "intended," but the principle involved applies to the situation in this case.

The remaining question is, how is the charterer's right to a reasonable time to be dealt with in this arbitration? The vessel never having gone to Victoria, how is this now to avail the charterers, who contend that they should even now be allowed credit for a sum to compensate them for the reasonable time which, in the view of the court, would have been available to them if they had sent the vessel to Victoria, and ask for a remission in order to ascertain what sum (if any) is due to them in this respect?

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[3] [1924] 2 K.B. 619; 40 T.L.R. 876.

[4] Sub nom. *Bunge y Born Limitada Sociedad* v. *Brightman & Co.* [1925] A.C. 799, 814; 41 T.L.R. 652.

[5] [1925] A.C. 799, 808.

I do not think the charterers are now entitled to this. They committed themselves, as the telegrams show, to an arbitration on the footing that they were entitled to all or none of the 11,000 dollars. They could not then bring themselves within the exceptions clause for the purpose of ascertaining what would have been a reasonable time if they had made attempts to obtain an alternative cargo, and not taken the stand that they were entitled to do nothing but wait for the strike to end.

I would dismiss the appeal.

ORMEROD L.J. There is no dispute on the facts of this appeal. They are set out in the statement of facts annexed to the award of the umpire. The question to be decided is whether in the circumstances the appellants are entitled to the protection of the exceptions clause in the charterparty. In considering the effect of that clause it is necessary to consider the nature of the charterparty itself. This is well summed up by the judge when he says: "It was, therefore, a voyage charter with a wide possibility of "variations of port of loading, and one which entitled the "charterer to load a great variety of cargo, including all lawful "merchandise."

The material words of the exceptions clause, which is clause 4 of the charterparty, are: "Charterers shall not be responsible for "any delay if the cargo intended for shipment under this charter-"party cannot be provided, delivered, loaded or discharged by "reason of strikes or lock-outs of any class of workmen or "stoppage of labour connected in any way with or essential to "the providing, delivery, loading or discharge of the cargo." According to the agreed statement of facts it was on June 13, 1952, the intention of the appellants to load certain cargo of a kind and in a rotation there set out, and on June 27, 1952, they declared their intention to the respondents. The intended rotation involved proceeding to Victoria to load timber. On June 16, however, a strike of lumbermen broke out in British Columbia which prevented the loading of timber at Victoria. The appellants' contention is, that on a true construction of the charterparty, they would nevertheless have been entitled to proceed to Victoria, and wait for the strike to end without incurring any penalty. The respondents, on the other hand, submitted that the obligation put upon the appellants by the charterparty was to load the ship within the prescribed time with one or more of the permitted varieties of cargo; and the fact that one of these varieties could not be loaded because of a strike did not entitle the appellants to the protection of the exceptions clause, even though the cargo in question was cargo which the appellants "intended to load." Diplock J. rejected the appellants' contention, but held that the appellants would be entitled in the circumstances to a reasonable time to arrange for an alternative cargo. In his judgment he said[6]: "I think, therefore, "that on the true construction of the exceptions clause, if this "vessel had gone to Victoria—as the charterers were entitled to "send it—they would not have been entitled, as they claimed, "to sit with folded arms and keep it there and hold it until the "strike ended on July 30. It would have been their duty to "make alternative arrangements. It would have been their duty "to make preliminary arrangements before they sent the vessel "to Victoria if there was a reasonable likelihood of the strike "continuing when the vessel arrived, and to make definite "arrangements as soon as it was clear that it would continue. "They were entitled to a reasonable time to make those "arrangements, but to nothing more."

This passage from the judgment of Diplock J. crystallises, as I read his judgment, his opinion of the amount of the relief to which the appellants were entitled by virtue of the exceptions clause in the particular circumstances which had arisen.

The issue between the parties as it came before the umpire, and, indeed, as it comes before this court, is contained in a series of cablegrams which passed between the parties between June 27, 1952, and July 7, 1952. The umpire had to decide whether, if the ship had gone to Victoria to load timber pursuant to an order by the appellants on June 27, 1952, the time she would have had to wait until the cargo could be loaded at the end of the strike would have counted as laytime. In the ordinary way, the laytime would commence once the ship was at Victoria ready to load, but it would not so commence if the appellants were exempted from delay under clause 4. The submission of the appellants is really a simple one. It is sufficient, they submit, if they can show (1) what the intended cargo was, and (2) that it could not be loaded by reason of the strike. There could be no question as to the intended cargo. It was clearly defined in the agreed statement of facts. It is equally clear that the timber could have been loaded at Victoria but for the strike, which would have prevented it.

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[6] [1959] 1 Q.B. 238, 250.

It was argued that in these circumstances, clause 4 must apply; that the ordinary meaning of the words "delay if the cargo "intended for shipment . . . cannot be . . . loaded . . . by reason "of . . . strikes" was such as to cover a case of this kind where the intended cargo had been declared. It was pointed out by Mr. Kerr that the words "cargo intended for shipment" occurred only in clause 4, and that the words used in clause 1 of the charterparty when referring to the obligation to load were "a full "and complete cargo," and that the words in clause 4 must, therefore, be given a narrower meaning.

The judge, in coming to his decision, relied on the authority of *Brightman & Co.* v. *Bunge y Born Limitada Sociedad* in this court,[7] and in the House of Lords.[8] In that case the obligation on the charterers was to load a cargo of "wheat and/or maize "and/or rye," and the exceptions clause provided as follows: "If the cargo cannot be loaded by reason of obstruction beyond "the control of the charterers or the railways the time for loading "shall not count during the continuance of such cause." There was delay because of a "go-slow" movement on one of the railways used for carrying wheat to the port of loading, and there was further delay because of a prohibition to load wheat imposed by the authorities. It was held that on neither cause for delay could the charterers succeed. Their obligation was to load "wheat and/or maize and/or rye"; and if the cargo intended by the charterers to be loaded was not available, the obligation remained to load with an alternative one. In the Court of Appeal it was held that the charterers were entitled to a reasonable time to see if the prohibition was likely to be removed, and to make arrangements for an alternative cargo, although Lord Dunedin in the House of Lords indicated that he was not satisfied that this question might not require examination at some future time.

Mr. Kerr sought to distinguish *Brightman's* case[9] first by submitting that it was not an authority on the obligation to switch cargoes in the case of an excepted peril, as it was held that the circumstances of the "go-slow" movement did not entitle the charterers to the protection of the exceptions clause. It was a case in prohibition. This, of course, is true, but it would seem that the same reasoning on this point might well apply in the case of an excepted peril as in the case of a prohibition. But the distinction upon which Mr. Kerr chiefly relied was in the difference of language in the exceptions clause. In his submission, the words "cargo intended for shipment under this charterparty" were vital; and if the cargo, the loading of which would have been delayed by the strike, could be brought within the meaning of those words (as was clearly so in this case), then the appellants were entitled to the protection of the clause.

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[7] [1924] 2 K.B. 619.

[8] [1925] A.C. 799.

[9] [1925] A.C. 799.

Mr. MacCrindle, for the respondents, argued that this was a fixed-time charterparty, the effect of which was to impose upon the charterers an absolute duty to load and discharge within a fixed time, subject to any exceptions in the charterparty. He submitted that the charterparty was not one to load timber, and that the nomination by the appellants of a cargo did not transform it into one. They could have shipped any of a wide range of cargoes. Therefore, in the absence of an express provision to the contrary, the obligation of the appellants to load a full and complete cargo meant that if they were unable to load one cargo, they were bound to load something else. Again the question comes back to the true construction of the exceptions clause. Is there anything in it to negative that duty on the appellants? The appellants argue that the words "cargo intended for shipment" are sufficient to do so. The respondents, on the other hand, say that the word "delay" refers to delay in loading a full and complete cargo, and not to delay in loading the cargo intended for shipment.

In my judgment, the submission of the respondents is the right one. On the true construction of the exceptions clause, the appellants would not be entitled to wait at Victoria until the strike was settled simply because they had declared that they intended to load timber there. The appellants were under no obligation to elect to load any particular cargo. They had a wide range from which to choose; and if they selected one particular cargo within the range from which to choose, there was nothing in the charterparty to prevent them from changing their minds and substituting another cargo if circumstances seemed to warrant it. The construction contended for by the appellants would mean that the effect of the clause is that the appellants, once having declared their intention of loading a particular cargo at a particular port, could insist on waiting to carry out that intention so long as one of the perils specified in the clause existed, in spite of the fact that their obligation under the charterparty could be discharged by loading other cargoes at other ports within the permitted range. That is not, in my judgment, the meaning of the clause, and I am in full agreement with the view expressed by Diplock J. I would, therefore, dismiss the appeal.

Gorman J. (read by Hodson L.J.). This is a fixed-time charterparty, not a reasonable time. This imposes on the charterers an absolute duty to load or discharge the cargo in the fixed time, subject to the exceptions clause. The charterparty was not a charterparty to load lumber. The charterers had the right to ship a cargo within a wide range. There was a selection of cargoes open to them. The selection of any one of the permitted cargoes did not, in my view, amount to an election in the sense in which the term is generally used. There was upon the charterers a correlative duty, in the absence of exceptions clauses, to load a full load out of the range of cargoes open to their selection. If the charterers cannot load the cargo which they have in mind, they must load another cargo within such range.

The words in the exceptions clause in the charterparty are: "Charterers shall not be responsible for any delay if the cargo "intended for shipment under this charterparty cannot be pro- "vided, delivered, loaded or discharged by reason of strikes." The delay referred to in the clause is the delay in the performance of the obligations for which the charterers would otherwise be liable, that is, the obligation to load a full cargo within the range of cargoes referred to in the charterparty. The conception introduced by the word "if" would seem to be that of causation—that is, that there shall not be responsibility for the delay to which I have referred caused by the fact that the cargo intended for shipment cannot be provided by reason of strikes.

In my view, the expression "intended for shipment" indicates that the charterers had decided, from the permitted range of cargoes, to load one of such cargoes. It is a cargo selected by the charterers out of such range.

In his judgment, Diplock J. considers the reason for the insertion of the words "the cargo intended for shipment under "this charterparty." I agree with the judge when he says [10] that it was "necessary to define the extent to which interference with "provision for loading should be brought within the clause, and

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[10] [1959] 1 Q.B. 238, 250.

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"to define it very sensibly by limiting it to the cargo which it "was the intention of the charterer to load."

There is nothing in the expression "cargo intended for shipment" to permit the charterer to sit with his arms folded merely because, in a charterparty of this kind, one of the cargoes which happens to have been selected for shipment by the charterers cannot be provided or delivered by reason of a strike. In my view, the judge was correct in saying [11] that this expression was to give the charterer "a reasonable time to make "provision for other arrangements, when the arrangements he "had already made fell through because of the excepted perils." In my view, there is nothing in the exceptions clause to take away from the charterer the obligation to select something else from the permitted cargoes when the excepted peril arose. I do not agree with the contention advanced by Mr. Kerr that the charterer is entitled to adhere to the selection of cargo which he has made, and to rely upon the exceptions clause.

Appeal dismissed with costs.

Solicitors: *Botterell & Roche; Stokes & Mitcalfe.*

F. R. D.

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[11] [1959] 1 Q.B. 238, 250.

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July 10, 13, 16, 17, 20, 21, 22, 23, 27, 28, 29; *Nov.* 26.

Morris, Ormerod and Willmer L.JJ.

RIVERSTONE MEAT CO. PTY. LTD. v. LANCASHIRE SHIPPING CO. LTD.

[1955 R. 2318.]

Shipping—Bill of lading—Seaworthiness—Hague Rules—Damage to cargo due to defective storm valves—Negligence of workman of independent contractor—Whether shipowner liable for lack of due diligence—(Australian) Sea Carriage of Goods Act, 1924 *(No.* 22 *of* 1924)*—Carriage of Goods by Sea Act,* 1924 (14 *&* 15 *Geo.* 5, *c.* 22), *Sch., art. III, r.* 1, *art. IV, r.* 2 *(a).*

Ships' Names—Muncaster Castle.

Negligence—Safe system of work—Plant and equipment—Latent defect —Principle governing employer's liability.

Vicarious Liability—Delegate or independent operator—Specialised work—Liability of principal in contract or tort for due care— Whether liable for negligence of independent contractor.

On May 7, 1953, 150 cases of tinned ox tongues were shipped on board the defendants' vessel at Sydney for carriage to London under bills of lading to which the plaintiffs were parties. The bills were made subject to the Australian Sea Carriage of Goods Act, 1924.[1] When the goods were discharged at London 113 cases were found to be damaged by sea water which had entered the hold by way of defective inspection covers to storm valves on the port and starboard sides of the hold. Immediately before her outward voyage to Australia the vessel was passed through her No. 2 special survey and her annual load line survey. For this purpose the marine superintendent employed by the defendants' agents instructed a reputable firm of ship repairers to open up all the storm valves and inspection covers. After the inspection by the Lloyd's surveyor, a fitter employed by the repairers closed each inspection cover and secured it with nuts. Once the nuts had been hardened up no visual inspection could detect any unevenness in the position of the cover. No sea water entered the hold during the outward voyage and water was not discovered until the cargo was being unloaded in London. The presence of the water in the hold was due to the negligence of the fitter, who failed sufficiently to secure the nuts on the inspection cover, with the result that the working of the ship in rough weather loosened the nuts. The vessel with the hold in its then condition had remained classified by the classification society since she became a cargo vessel on conversion in 1948. There was no previous record of cargo damage in the hold. On a claim by the plaintiffs for damages for breach of contract, the trial judge rejected the contention of the cargo-owners that the carriers, having delegated their duty to repairers, had failed to prove that they had exercised due diligence to make the ship seaworthy and were therefore liable under article III, rule 1, of the Act of 1924. The plaintiffs appealed:—

Held, that, on the facts, the defendants had discharged the onus on them of showing that they had exercised due diligence to make the ship seaworthy, and therefore were not in law liable for the negligence of the repairers' fitter.

W. Angliss & Co. (Australia) Pty. v. *P. & O. Steam Navigation Co.* [1927] 2 K.B. 456; 43 T.L.R. 675 and *Davie* v. *New Merton Board Mills Ltd.* [1959] A.C. 604; [1959] 2 W.L.R. 331; [1959] 1 All E.R. 346 applied.

Dictum of Lord Wright in *Wilsons & Clyde Coal Co.* v. *English* [1938] A.C. 57, 80; 53 T.L.R. 944; [1937] 3 All E.R. 628 explained.

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[1] Australian Sea Carriage of Goods Act, 1924, Sch., art. III, r. 1: "The "carrier shall be bound, before and "at the beginning of the voyage, to "exercise due diligence to—(a) make "the ship seaworthy."
Art. IV, r. 2: "Neither the "carrier nor the ship shall be responsible for loss or damage arising or "resulting from—(a) act, neglect or "default of the master, mariner, "pilot, or the servants of the carrier "in the navigation or management "of the ship."

Per Morris L.J. I consider that the present case falls to be decided according as to whether the carriers delegated the performance of their duty or themselves performed and discharged it. The negligent fitter was not their servant, and there is no room for the application of the principle respondeat superior (post, p. 568).

Per Willmer L.J. Where the matter in question is one of building, or rebuilding, or repairing a ship, or of the supply of equipment or spare parts, I can see no reason in principle why the court cannot properly be invited to conclude, as a jury question, that the carrier has exercised due diligence, upon proof (a) that he has engaged a reputable contractor or supplier, (b) that he has provided for the work to be properly superintended by his own representative, and (c) that such representative has in fact exercised due diligence. To hold the contrary would, it seems to me, lead to absurd results which cannot have been in the contemplation of those who framed the rules (post, p. 582).

Decision of McNair J. [1959] 1 Q.B. 74; [1958] 3 W.L.R. 482; [1958] 3 All E.R. 261 affirmed.

Appeal from McNair J.[2]

By a bill of lading signed at Sydney on May 7, 1953, by the agent of the defendants, Lancashire Shipping Co. Ltd., and incorporating the provisions of the rules in the Australian Sea Carriage of Goods Act, 1924, 150 cases of ox tongues were shipped on board the defendants' vessel, *Muncaster Castle*, for carriage to London. The plaintiffs, Riverstone Meat Co. Pty. Ltd., were indorsees of the bill of lading. On arrival at London 113 cases were found to be damaged by sea water.

In an action by the plaintiffs for damages, it was claimed that the damage was caused by the unseaworthiness of the vessel, it being alleged, inter alia, that the inspection covers over the storm valves in the scupper pipes were defective, whereby sea water leaked into the hold and damaged the goods.

By their defence the defendants contended that they exercised due diligence to make the ship seaworthy and therefore were not in breach of article III, rule 1, of the Act of 1924. They also claimed the protection of the exception in article IV, rule 2 (*a*).

McNair J. gave judgment for the shipowners. He held that a carrier could not be held liable for want of due diligence to make a ship seaworthy within article III, rule 1 (*a*), of the Hague Rules, where the unseaworthiness had resulted, as in this case, from the negligence of a workman employed by a competent ship repairer engaged by the carrier, the result of whose negligence would not be discoverable by appropriate surveys and inspections carried out in accordance with ordinary prudent practice; that in the present case the shipowners had discharged the burden of proving that they had exercised due diligence and, therefore, were not liable under article III, rule 1 (*a*), of the Act of 1924.

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[2] [1959] 1 Q.B. 74; [1958] 3 W.L.R. 482; [1958] 3 All E.R. 261.

The plaintiffs appealed.

Ashton Roskill Q.C. and *John F. Willmer* for the plaintiff cargo-owners. This appeal raises the question of the nature and character of a shipowner's obligations under the Hague Rules to exercise due diligence to make the ship seaworthy. The judge found that the ship was unseaworthy when the plaintiffs' cargo was loaded; that that was due to the negligence of the repairers' fitter in replacing the storm valve covers after the inspection; that the closing of those covers tightly and evenly was within the competence of a fitter, and that the work was not supervised either by Atkinson (a marine superintendent acting as the respondents' agent) or by the classification surveyor. Where a shipowner has loaded cargo in his ship he is as a bailee subject to a bailee's obligation to deliver the goods in the same condition as he received them, and if he fails to do so he must show that by the terms of his contract he is not liable. That is the background to the "due diligence" obligation attached to a contract incorporating the Hague Rules. In practice, the Hague Rules are incorporated by a clause paramount in a bill of lading, and they are construed as part of the contract: Scrutton on Charterparties, 16th ed., p. 554; Carver's Carriage of Goods by Sea, 10th ed., p. 168. In *Stag Line Ltd.* v. *Foscolo, Mango & Co.*[3] Lord Macmillan said that in the interests of uniformity the interpretation of the Rules should not be rigidly controlled by domestic precedents, but that they should be construed on broad principles of general acceptation: that view was approved by the Judicial Committee of the Privy Council in *Maxine Footwear Co. Ltd.* v. *Canadian Government Merchant Marine Ltd.*[4] Some American decisions on not dissimilar problems under the Harter Act may be helpful.

Looked at narrowly, the issue here involves the interpretation of the particular contract evidenced by this bill of lading, but looked at broadly the problem is one of wide international importance. A bill of lading incorporating the Rules imposes a contractual duty on the carrier to exercise due diligence before

[3] [1932] A.C. 328, 350; 48 T.L.R. 127.

[4] [1959] A.C. 589, 603; [1959] 3 W.L.R. 232; [1959] 2 All E.R. 740.

and at the beginning of the voyage, so it contains a warranty by the carrier that he *has* exercised due diligence when the contract begins.

Stated affirmatively, the "due diligence" obligation is that the carrier is liable if due diligence is not exercised by any person to whom the performance of the obligation is delegated. If that is right, then non-performance by the delegatee is non-performance by the carrier, and it is therefore irrelevant what label is attached to the delegatee: see *per* Denning L.J. in *Cassidy* v. *Ministry of Health*[5] and Winfield on Tort, 6th ed., p. 167. There is no shipping case in this country which decides, so as to be binding on this court, that that principle would not apply in the case of the Hague Rules. The position here is that the carrier has undertaken the performance of an obligation analogous to that of an employer to his servant: see *Davie* v. *New Merton Board Mills Ltd.*[6] In no case has it ever been successfully contended that the mere employment of a competent person to carry out a repair is sufficient in all cases to exonerate the employer from liability. The basic question is: Is one relieved from liability because one employs a competent independent contractor? In the case of a ship under the Hague Rules it is submitted that there is much forceful authority for saying that that is not the case.

In *G. E. Dobell & Co.* v. *Steamship Rossmore Co.*[7] it was held that it was not enough to satisfy the condition that the shipowner had shown due diligence to make the ship seaworthy by employing competent men to do the work. The condition required that the due diligence should be exercised by the shipowner himself, or by those whom he employed, and he was responsible for any shortcomings of his agents or subordinates. That case came under the Harter Act, which required an absolute warranty of seaworthiness: see the United States Carriage of Goods by Sea Act, 1936, sections 1 to 8 of which contained a modified statement of articles I to VIII of the Hague Rules. There is no authority for the view that where a ship is entrusted for repairs to competent ship repairers the shipowner performs his "due diligence" obligation if he appoints a competent superintendent, who is not himself negligent. Wright J. in *W. Angliss & Co. (Australia) Pty.* v. *P. & O. Steam Navigation Co.*[8] refers to the possibility that the carrier may have a special duty to see, by special advisers, that repairs are adequately carried out. That could mean that unless he appoints "special advisers" he does not exercise due diligence; but that is inconsistent with the principle that the shipowner does not escape liability by appointing competent agents. The note in Scrutton on Charterparties, 16th ed., p. 473, is, it is submitted, wrong. The position is correctly stated in Carver's Carriage of Goods by Sea, 10th ed., p. 181. A marine superintendent is not a "special or technical adviser." He is a watchdog; from the point of view of due diligence his presence, if the repairers are competent, is superfluous. If the marine superintendent is a "special adviser" and is negligent in detecting bad work, the shipowner, having delegated the performance of his "due diligence" obligation to his superintendent, is liable for the bad work. If the shipowner is only liable if his superintendent is negligent, he is in effect only liable for his servant's negligence: or the class of agents is limited capriciously so as, in effect, to equate agents and servants. The dictum of Lord Wright in *Wilsons & Clyde Coal Co.* v. *English* [9] is at variance with his dictum in the *Angliss* case.[10]

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[5] [1951] 2 K.B. 343, 363.

[6] [1958] 1 Q.B. 210; [1958] 1 All E.R. 105.

[7] [1895] 2 Q.B. 408.

[8] [1927] 2 K.B. 456; 43 T.L.R. 675.

The decision of the trial judge is wrong in principle and, in so far as it is based on the *Angliss* case,[10] involved a misapprehension of the basis of that decision. The judge reads too much in the *Angliss* case [10]; it was not applied in *Smith & Sons* v. *P. & O. Steam Navigation Co.*[11] On any view of the *Angliss* case [12] marine engineers were not such special advisers that the mere appointment of them would enable the shipowner to escape liability.

How the impact of the Hague Rules on the Carriage of Goods by Sea Act was regarded appears in Scrutton on Charterparties, 12th ed., p. 449; 13th ed., p. 513, and Carver's Carriage of Goods by Sea, 10th ed., p. 181. The *Angliss* case,[12] if properly looked at, is very helpful to the plaintiffs. In that case it was held that there was no delegation. It is submitted that in the present case there was. Wright J. did not mean that if a shipowner does appoint a special adviser he has thereby fulfilled his obligation. He meant that if you do not appoint your special adviser, you cannot claim to have fulfilled your obligation. There is no authority which supports the view that the employment of a competent assistant is the performance of the "due diligence" obligation. The *Angliss* case [12] is no such authority. There is no basic conflict between the *Angliss* case [12] and *Wilsons & Clyde Coal Co.* v.

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[9] [1938] A.C. 57; 53 T.L.R. 944; [1937] 3 All E.R. 628.

[10] [1927] 2 K.B. 456.

[11] (1938) 60 Ll.L.Rep. 423.

[12] [1927] 2 K.B. 456.

English[13] if *Angliss* is considered as a delegation case. The only possible conflict of view is in the obiter passage in *Angliss* that the shipowner might escape by appointing a special adviser, which, it is submitted, is not the case.

[Reference was also made to the following cases: *The Irrawaddy*[14]; *The Mary L. Peters*[15]; *The Colima*[16]; *The Abrazia*[17]; *Bethlehem Shipbuilding Corporation* v. *J. Gutradt Co.*[18]; *American Linseed Oil Co.* v. *Norfolk and North American S.S. Co.*[19]; *Paterson Steamships Ltd.* v. *Robin Hood Mills Ltd.*[20]; *Minister of Materials* v. *Wold S.S. Co. Ltd.*[21]; *London and Rangoon Trading Co.* v. *Ellerman Line*[22]; *Paterson Steamships Ltd.* v. *Canadian Co-operative Wheat Producers Ltd.*[23]; *Smith, Hogg & Co. Ltd.* v. *Black Sea and Baltic General Insurance Co. Ltd.*[24]; *International Packers (London) Ltd.* v. *Ocean S.S. Co. Ltd.*[25]; *Francis* v. *Cockrell*[26]; *Paine* v. *Ocean Steamship Co.*[27]; *Hourani* v. *Harrison*[28]; *Donoghue* v. *Stevenson*[29]; *Davie* v. *New Merton Board Mills Ltd.*[30]]

A. A. Mocatta Q.C. and *Michael Kerr* for the defendant shipowners. The point raised by this case was settled by the principles laid down in the judgment of Wright J. in *W. Angliss & Co. (Australia) Pty.* v. *P. & O. Steam Navigation Co.*[31] That judgment has been approved and applied by judges of first instance without a word of criticism, and McNair J. said of it in the present case: "This judgment has since that date been "accepted by the profession as stating the legal position autho-"ritatively and accurately."

The submissions for the defendants fall under four main heads: (1) An examination of the Act, without reference to authority, tends to support the defendants' case, though, perhaps, not conclusively. (2) A consideration of the effect of the decided cases —English and non-English. There are three of the former, all at first instance, which support the defendants' case. In none of the American cases cited for the plaintiffs were the facts like those here, and most were on the Harter Act and are of little help. (3) Very little help is to be derived from analogies in the law of contract, because (a) the closest analogy is clearly common law on carriage by sea, and that is ex hypothesi excluded—the Act alters the common law; (b) the range of duties upon a party to a contract vary so widely according to the nature of the contract that little help can be given in considering a contract which is not analogous, and particularly when the common law relating to that contract has been altered. (4) Considerable and favourable light is given to the defendants by analogies drawn from the law of tort. This, however, is not an altogether easy field to investigate, since, as was said in the House of Lords in *Davie* v. *New Merton Board Mills Ltd.*,[32] there is a border-line of difficult cases. It is submitted, however, that the following propositions are a safe guide through the tangle of the law of tort: (i) Ascertain first whether there is a duty at all. (ii) Ascertain whether the duty is (a) to take reasonable care or (b) to see that all reasonable care is taken. (iii) As regards (ii) (b), the major instances are cases of special duties imposed by statute and a class of cases dealing with extra-hazardous acts or highway cases. The court is not concerned with those here. (iv) As regards (ii) (a), it is a question of fact in each case whether the duty to take reasonable care has been performed, and in considering this the court has regard to whether what has been done ordinarily or normally forms part of the obligor's trade, business or activities. If it does, then, if it has been done negligently, the obligor is liable, whether he did it himself or by his servant or agent or by an independent contractor. If what has been done does not ordinarily or normally form part of the obligor's trade, business or activities, he has discharged his duty by selecting a properly skilled person, other than a servant, to do it, and is not liable if it was done negligently. So here, the defendants, having selected skilled independent contractors to execute this particular class of work, were not liable for their negligence.

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[13] [1938] A.C. 57.
[14] (1897) 171 U.S. 187.
[15] (1895) 68 Fed. 919.
[16] (1897) 82 Fed. 665.
[17] (1904) 127 Fed. 495.
[18] (1926) 10 Fed. 769.
[19] (1929) 32 Fed. (2d) 281.
[20] [1937] W.N. 189; 58 Ll.L.Rep. 33.
[21] [1952] 1 Lloyd's Rep. 485.
[22] (1923) 14 Ll.L.Rep. 497; 39 T.L.R. 284.
[23] [1934] A.C. 538; 51 T.L.R. 5.
[24] [1940] A.C. 997; [1940] 3 All E.R. 405.
[25] [1955] 2 Lloyd's Rep. 218.
[26] (1870) L.R. 5 Q.B. 501.
[27] (1927) 43 T.L.R. 358.
[28] (1937) 32 Com.Cas. 305.
[29] [1932] A.C. 562; 48 T.L.R. 494.
[30] [1959] A.C. 604; [1959] 2 W.L.R. 331; [1959] 1 All E.R. 346.
[31] [1927] 2 K.B. 456.

The argument for the plaintiff was further supported by stressing the need for uniformity and contending that his submission was consistently supported by a long line of authority, and pointing to the alleged hardship which would be imposed on bill of lading holders if his view was not upheld. This is irrelevant and unreal. Plaintiff's counsel also placed reliance on the position of the carrier as a bailee, who, if he delivered the goods damaged,

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[32] [1959] A.C. 604.

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must show some excuse. He went back to *Coggins* v. *Bernard*[33] for this. The defendants rely, in reply, on article IV (1).

There is undoubtedly a contractual obligation on the carriers to exercise due diligence to make the ship seaworthy before and at the beginning of the voyage; the question here is whether they have discharged that obligation. The overriding proposition of law for which the defendant shipowners contend is that if the unseaworthiness has resulted from the negligence of a workman employed by a competent ship repairer engaged by the carrier, and the result of the workman's negligence could not have been discovered by appropriate surveys and inspections carried out in accordance with ordinary prudent practice, then the shipowners would not be liable. That is a reasonable proposition; there is nothing in the Act or the Schedule pointing against it, and the abolition of absolute warranty supports it. If it is incorrect, where is the line to be drawn?

W. Angliss & Co. (Australia) Pty. v. *P. & O. Steam Navigation Co.*[34] was the first authoritative exposition of the Act (save for *Gosse Millerd* v. *Canadian Merchant Marine*,[35] which did not touch on seaworthiness or due diligence), and unless it is wrong in principle it is decisive of the present case. No one has ever suggested that it is wrong, and it cannot be differentiated. What Wright J. said about repairs is admittedly obiter, but what he said about rebuilding is not. It was a building case, but it cannot be differentiated in principle from repairs, which may involve new plates or parts of the ship. It is said that the work in question was not repair but load line survey. But the storm valves had to be opened up, and repairs might have been necessary; it was a distinction without a difference. In *Smith & Sons* v. *P. & O. Steam Navigation Co.*[36] Singleton J. applied the decision of Wright J. in regard to repairs. *The Australia Star*,[37] which was not cited to McNair J., was also decided on this basis. This court should follow the foregoing three decisions: see *Louis Dreyfus & Co.* v. *Tempus Shipping Co.*[38]

Dicta to the contrary in the following cases, cited for the plaintiffs, are, it is submitted, distinguishable: *Paterson Steamships Ltd.* v. *Robin Hood Mills Ltd.*[39]; *Paterson Steamships* v. *Canadian Co-operative Wheat Producers Ltd.*[40]; *Wilsons & Clyde*

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[33] 2 Ld.Raym. 909.
[34] [1927] 2 K.B. 456.
[35] [1929] A.C. 223; 45 T.L.R. 63.
[36] 60 Ll.L.Rep. 423.
[37] (1940) 67 Ll.L.Rep. 110.
[38] [1931] A.C. 726, 732.
[39] (1937) 58 Ll.L.Rep. 33.
[40] [1934] A.C. 538.

Coal Co. v. *English*[41]; *Northumbrian Shipping Co.* v. *Timm & Son*[42]; *Smith, Hogg and Bamberger* v. *Black Sea and Baltic General Insurance Co. Ltd.*[43]; *Cranfield Bros.* v. *Tatem S.N. Co. Ltd.*[44]; *Waddle* v. *Wallsend Shipping Co. Ltd.*[45]; *Minister of Materials* v. *Wold S.S. Co. Ltd.*[46]; *International Packers (London) Ltd.* v. *Ocean S.S. Co. Ltd.*[47] and *Maxine Footwear Co. Ltd.* v. *Canadian Government Merchant Marine Ltd.*[48]

The defendants, having selected a properly skilled person to do the work of repair, were not liable when the work was done negligently. The facts found by the judge were all unchallenged, and the defendants did exercise due diligence to make the ship seaworthy in accordance with their obligation under article III, rule 1, and article IV, rule 1, of the Rules scheduled to the Australian Sea Carriage of Goods Act, 1924. The Act requires that the carrier shall exercise due diligence, not that due diligence shall have been exercised. The Act does expressly mention agents in relation to article III, rule 2, by its reference to article IV. Not so to article III, rule 1. This suggests, to put it no higher, that the obligations are not the same in character as distinct from subject-matter. See also article VI. There is nothing in the Act to prevent the general law of the land applying to obligation under article III, rule 1, i.e., nothing making the carrier necessarily liable for the negligence of a competent independent contractor in repairing the ship.

In *Cranfield Bros.* v. *Tatem S.N. Co. Ltd.*,[49] *Waddle* v. *Wallsend Shipping Co. Ltd.*[50] and *The Assunzione*[51] the principle laid down in the *Angliss* case[52] in regard to repairs or building was approved. In *Davie* v. *New Merton Board Mills Ltd.*[53] Viscount Simonds and Lord Reid, by inference, respectively approved *Angliss* on building or repair. None agreed with Lord Wright in *Wilsons & Clyde Coal Co.* v. *English*[54] if his dicta in that case differed from what he said in the *Angliss* case.[55] Against this formidable weight of authority, which establishes that the carrier is not liable for the negligence of the fitter in this case, can only be set dicta in cases where the point has not been raised in clear form on the facts and has not been argued. If the argument for the defendants is wrong it will be necessary in future in this class of case to plead positively and prove that all the servants and agents of the repair yard and all the servants and agents of their agents used due diligence—an impossible burden never intended by the Act.

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[41] [1938] A.C. 57.

[42] [1939] A.C. 397.

[43] [1940] A.C. 997.

[44] (1939) 64 Ll.L.Rep. 264.

[45] [1952] 2 Lloyd's Rep. 105.

[46] [1952] 1 Lloyd's Rep. 485.

[47] [1955] 2 Lloyd's Rep. 218.

[48] [1959] A.C. 589.

[49] 64 Ll.L.Rep. 264.

[50] [1952] 2 Lloyd's Rep. 105.

[51] [1954] P. 150; [1953] 1 W.L.R. 929; [1954] 2 W.L.R. 234.

[52] [1927] 2 K.B. 456.

[53] [1959] A.C. 604.

[54] [1938] A.C. 57.

[55] [1927] 2 K.B. 456.

Ashton Roskill Q.C. in reply. The opening words of article III, rule 1, of the Hague Rules impose a clear obligation: "The "carrier shall be bound before and at the beginning of the voyage "to exercise due diligence to—(*a*) make the ship seaworthy." If he fails to perform that obligation, he cannot excuse himself by saying "It was not I who was negligent; it was the person I got "to do the work." The statute and contract provide that the carrier shall perform the obligation. The problem is not solved by asking: Is the carrier in law liable for the negligence of an independent contractor's workman? The approach of the defendants is not the proper one and never has been accepted on either side of the Atlantic. The *Angliss* case[55] decided that a shipowner was under no Hague Rules obligation to exercise due diligence to build a seaworthy ship: he was not responsible for the shipbuilder's workmen. That is accepted, but there is no indication in the *Angliss* case that Wright J. approached the problem with the view that a shipowner's obligation was just to exercise reasonable care in the circumstances. This is borne out by the opening words of his judgment: "The obligation of the carrier "to exercise due diligence to make the ship fit is clearly not "limited to his personal diligence." If Wright J. had had the advantage of reading the speeches of the House of Lords in *Davie* v. *New Merton Board Mills Ltd.*[56] he would, it is submitted, have stated his judgment in a different way. Briefly, the court is concerned with the merits of two separate approaches, the reasonable care approach and the delegation approach. The reasonable care approach found no reflection in any of the earlier authorities; the delegation approach did. There is a strong stream of authority which supports the plaintiffs' submissions. The defendants are inviting the court to throw overboard strong and clear indications of what the true position is in law and, if they succeed, much confusion and uncertainty must result.

Cur. adv. vult.

November 26, 1959. The following judgments were read.

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[55] [1927] 2 K.B. 456.

[56] [1959] A.C. 604.

MORRIS L.J. On May 7, 1953, a number of cases of canned ox tongues were shipped in good order and condition on board the S.S. *Muncaster Castle* at Sydney. The ship belonged to the defendants—Lancashire Shipping Co. Ltd. The goods were shipped for carriage to London. They were stowed in the after part of No. 5 lower hold. They were shipped under a bill of lading signed at Sydney on May 7, 1953. The goods belonged to the plaintiff appellants, Riverstone Meat Co. Pty. Ltd., who, either as original shippers or as indorsees, were parties to the bill of lading. It was a term or condition of the bill of lading that it should have effect subject to the provisions of the rules in the schedule to the Australian Sea Carriage of Goods Act, 1924, as applied by that Act. The carriers were to be entitled to all the privileges, rights and immunities contained in that Act and its schedule as if the same were specifically set out in the bill of lading.

The ship arrived in London on July 12, 1953. On July 16 it was found that there was some water in No. 5 hold. No water had previously been detected. It has been held by McNair J. that sea water had entered No. 5 hold by way of defective storm valves on the port and starboard sides of that hold, there being one valve on each side. When the appellants' goods were discharged it was found that 113 cases, out of a total of 150, were damaged by the sea water that had entered the hold. The appellants made a claim for the damage to the goods. The amount of their loss, £974 10s. 3d., was not in dispute. The appellant cargo-owners alleged that their loss was caused because the ship was unseaworthy. One respect in which unseaworthiness was alleged was that the inspection covers over the storm valves in the port and starboard scupper pipes situated in the forward frame space of No. 5 hold were defective, whereby sea water leaked into the hold. Other allegations of unseaworthiness were made at the trial with which we are not now concerned. In the result, after a careful investigation, the judge held that the vessel was unseaworthy in that, at the time when the appellants' cargo was loaded at Sydney, the nuts on the inspection covers were loose to such an extent as would permit of water finding its way into the hold. The respondent shipowners said, however, that they could exonerate themselves by reason of the contractual term contained in the bill of lading giving them similar protection to that given by the schedule to the Australian Sea Carriage of Goods Act, 1924. Article III, rule 1, of such schedule provides as follows: "The carrier shall be "bound, before and at the beginning of the voyage, to exercise "due diligence to—(a) make the ship seaworthy; (b) properly "man, equip, and supply the ship; (c) make the holds, re-"frigerating and cool chambers, and all other parts of the ship "in which goods are carried, fit and safe for their reception, "carriage and preservation." Article III, rule 2, provides: "Subject to the provisions of Article IV, the carrier shall pro-"perly and carefully load, handle, stow, carry, keep, care for "and discharge the goods carried." Article IV, rule 1, provides as follows: "Neither the carrier nor the ship shall be liable for "loss or damage arising or resulting from unseaworthiness unless "caused by want of due diligence on the part of the carrier to "make the ship seaworthy, and to secure that the ship is pro-"perly manned, equipped and supplied, and to make the holds, "refrigerating and cool chambers and all other parts of the ship "in which goods are carried fit and safe for their reception, "carriage and preservation in accordance with the provisions of "paragraph 1 of article III. Whenever loss or damage has "resulted from unseaworthiness the burden of proving the exer-"cise of due diligence shall be on the carrier or other person "claiming exemption under this section."

The question, therefore, arose at the trial whether the shipowners could discharge the burden of proving that there had been no want of due diligence on their part to make the ship seaworthy. They had contractually bound themselves so that, before and at the beginning of the voyage from Sydney, which commenced when the vessel first left Sydney after May 7, 1953, they were under obligation to exercise due diligence in certain respects, which included exercising due diligence to make the ship seaworthy. In fact, as has been held by the learned judge, and as is not now challenged, the vessel was not seaworthy on May 7, 1953. She was unseaworthy because the inspection covers were in the condition to which I have referred. The appellants' loss did in fact result from such unseaworthiness. The learned judge had, therefore, at the trial to investigate whether the respondents had exercised due diligence to make the ship seaworthy. The onus was on them to establish that they had. The very nature of the inquiry involves that the exercise of due diligence to make the ship seaworthy may not always bring it about that a ship is seaworthy.

The conclusions of fact reached by the learned judge were not the subject of dispute or complaint upon the hearing of the appeal. When it is being considered whether due diligence to make a ship seaworthy has been exercised it may be helpful to ascertain the history and the record of the ship and then to proceed to consider (inter alia) whether there have been such steps and such procedures as a prudent and careful carrier would take and follow.

It will, I think, be convenient to summarise the main conclusions of fact which were recorded by the judge.

1. The ship was acquired by the respondents in the year 1949. She had been built in the United States of America during the last war. She was originally completed as an aircraft carrier and was converted into a cargo carrier in 1948: so converted she conformed in all material respects to a C.3 type cargo vessel. On conversion she was classified with the British Corporation (which was united with Lloyd's Register in 1949) and remained so classified at all material times. Her tonnage was 8,000 gross and 4,800 net.

2. Throughout her service with the respondents, which continued until 1955, she was well maintained.

3. In February, 1953, which was immediately before the ship set out for Australia, she was passed through her No. 2 special survey by Lloyd's Register Surveyors. The ship was placed in the hands of Alexander Stephen & Sons Ltd. at Glasgow. She went into dry dock. Her class of registration was the highest for ships that had not been built under the supervision of the Society, and after the survey she was reported to be "so far "as seen in good condition and eligible to remain as at present "classed in the Register Book."

4. On the same occasion she was passed through her annual load line survey. After the inspection by the Surveyor to Lloyd's Register, he certified that the arrangements on board the ship were in agreement with or equivalent to those given in the original freeboard report and he verified the freeboard marking.

5. Under rules made under section 42 of the Merchant Shipping (Safety and Load Line Conventions) Act, 1932, provision is made for the examination at the annual survey of the discharges leading through the ship's side from spaces below the freeboard deck. In practice Lloyd's surveyors are content if 25 per cent. of the sea outlets are opened up for inspection on the annual survey, but in fact the respondent shipowners insist that they should all be opened up.

6. Mr. Atkinson, of Moller Line U.K. Ltd., the managers of the ship, was attending to the ship on behalf of the respondents

on the surveys. Mr. Atkinson is an experienced and competent marine superintendent. In compliance with the practice of the respondents, Mr. Atkinson instructed Alexander Stephen & Sons Ltd. to open up all the storm valves on the ship for inspection. They numbered 31 in all, including the two which were positioned in No. 5 hold. The opening of the storm valves necessarily involved opening up the inspection covers. That was done.

7. After the inspection by the surveyor to Lloyd's Register it became the duty of a fitter employed by Alexander Stephen & Sons Ltd. to replace and close the inspection covers. The covers are placed over the studs which are in the top of the inspection chamber and nuts are placed in position. The nuts should then be tightened at opposite angles to ensure even all-round pressure. If the nuts on one side are both tightened up before there is any tightening on the other side, the pressure will be uneven and it will be impossible to make a secure joint. This will be so even though the nuts ring true if, after being tightened up, they are tapped with a spanner.

8. The task of tightening up the nuts, when an inspection cover is replaced, is one that is well within the competence of a skilled fitter. It is ordinary and prudent practice to leave this task to a fitter and not to have the supervision either of Lloyd's surveyors or of the owners' superintendent.

9. Once the nuts have been tightened up no visual inspection could detect any unevenness in the positioning of the cover or any insufficiency in tightening up.

10. Alexander Stephen & Sons Ltd. are a ship repairing concern of the highest repute.

11. The ship sailed from Glasgow on March 15, 1953, with a general cargo for Australian ports. The cargo stowed in the after half of No. 5 hold was discharged at Sydney. None of the cargo carried on the outward voyage in No. 5 hold was damaged by sea water.

12. After the discharge at Sydney of the outward cargo stowed in the after half of No. 5 hold and before the appellants' cargo was taken on board and there stowed, the hold was inspected by the Chief Officer. There was no sign of leakage of sea water.

13. The ship left Sydney on May 7 and proceeded to Brisbane, where outward cargo from Glasgow that had been in the forward part of No. 5 hold was discharged. As a result the places where the storm valves were situated became visible. The Chief Officer again inspected the hold and there were no signs either of sea

water staining or of rust. The two inspections made by the Chief Officer and referred to above were properly carried out. No sea water did enter No. 5 hold on the outward voyage to Australia either through the storm valves or at all.

14. On the voyage from Australia there was a certain amount of rolling and pitching of the ship which was sufficient to loosen the nuts of the inspection covers in No. 5 hold if they had been improperly tightened up in Glasgow and if there had been some loosening in the working of the ship on the outward voyage.

15. The cause of the admission of sea water was that the fitter at Glasgow " negligently failed to secure the nuts on the " inspection cover evenly or sufficiently with the result that " the working of the ship on the outward voyage was sufficient to " produce the condition, by the time the plaintiffs' cargo was " loaded at Sydney, that the nuts had been loosened to such an " extent that with the vessel rolling and waves striking the sides " of the ship, sea water was forced through the interstices below " the inspection covers."

It seems to me that the question whether a carrier has exercised due diligence to make a ship seaworthy is primarily a question of fact. (See *Paterson Steamships Ltd.* v. *Canadian Co-operative Wheat Producers Ltd.*[1]) It must depend upon the particular features and circumstances of each particular case. It is for this reason that I have considered it appropriate to record the relevant findings of fact made by the judge in this case. Those findings are not challenged. On those findings did the respondents show that they had exercised due diligence to make the ship seaworthy? The judge was of opinion, subject to a consideration of one matter, that the respondents had discharged the burden that was upon them. The one matter was whether it could be said that the respondents must be held accountable in law for the negligence of the fitter. The conclusion of the judge was succinctly expressed in the words: " Unless the defendants " are in law responsible for the negligence of the fitter, as I have " found it, they have discharged the onus of proving the exercise " of due diligence so far as concerns the inspection covers." That conclusion is not challenged on appeal. The judge proceeded to consider whether the respondents were responsible in law for the negligence of the fitter. Upon an examination of the authorities he decided that they were not and, accordingly, he exonerated them. His decision as regards that one matter is now challenged on appeal.

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[1] [1934] A.C. 538, 543; 51 T.L.R. 5.

The issue so raised is in neat and concentrated form. For our assistance in resolving it, we have had the advantage of hearing most powerful and learned and painstaking arguments from counsel, to whom we are greatly indebted. We were referred to and we considered a great many authorities.

The point which is in contest is, however, an extremely short one. Did the respondents exercise due diligence to make the ship seaworthy? The appellants submit that as the respondents were under a duty to exercise due diligence, they are liable if they failed to perform their duty or if there was a failure on the part of anyone to whom the performance of the duty was delegated. That submission may in general be sound, but it prompts the inquiry as to whether the respondents did perform their duty and the inquiry whether they delegated performance of it. In the case of something so complex as a modern ocean-going ship, it is only reasonable to recognise that there must be a variety of matters which call for skilled or expert or specialised attention. There may be repairs or overhauls or adjustments or inspections which demand knowledge, experience and skill and which normally and reasonably are entrusted to those possessing the qualifications to undertake the work which has to be done. In the present case, which must depend upon its own facts, it seems to me that it was eminently reasonable for the respondents to entrust a ship repairing concern of the highest repute with the surveys to which I have referred, and, incidentally, with the task of taking off the inspection covers and of replacing them after the conclusion of the inspection by the surveyor to Lloyd's Register. On the facts as found, I would consider that in doing what they did the respondents did exercise due diligence to make their ship seaworthy. There was no delegation by them of their duty to exercise due diligence to make their ship seaworthy. There was a performance by them of that duty. They did exercise due diligence by taking steps which included employing Alexander Stephen & Sons Ltd. The particular task in regard to the inspection covers was well within the competence of a fitter: no supervision of a fitter was either in prudence or according to practice called for.

Unless, therefore, there is some authority which directs me to a different conclusion, I consider that the respondents proved that they had exercised due diligence to make their ship seaworthy.

That was their duty. Such duty must not be unwittingly misstated so as to enlarge it into a duty to make the ship as seaworthy as due diligence on the part of anyone could make it.

In considering the present case the judge referred to what Wright J. said and decided in *W. Angliss & Co.* (*Australia*) *Pty.* v. *P. & O. Steam Navigation Co.*,[2] and to the speech of Lord Wright in *Wilsons & Clyde Coal Co.* v. *English.*[3] But, subsequently to the decision of the judge in the present case, the House of Lords have decided *Davie* v. *New Merton Board Mills Ltd.*[4] We, therefore, have the advantage of the authoritative guidance which is given in the speeches in *Davie's* case and we are relieved of the task of venturing to analyse the earlier pronouncements which were there considered. In his speech in *Davie's* case Viscount Simonds said[5]: "And, much as "I distrust analogies, I would add that there is a striking "resemblance between the shipowner who is held not to be liable "for the bad workmanship, undiscoverable by him, of the ship-"builder's employees and the employer who claims not to be "liable for the bad workmanship, equally undiscoverable, of the "employees of the manufacturer who supplied at second hand "the tools with which he has provided his workman." I do not read the speeches of Viscount Simonds or of Lord Reid as challenging the conclusion reached by Wright J. in the *Angliss* case.[6] Wright J. there decided that where a carrier contracted for the building of a ship he was not liable for lack of due diligence on the part of the shipbuilders or their workmen unless he had failed to engage builders of repute and to adopt all reasonable precautions, such, for example, as requiring the builders to satisfy one of the recognised classification societies or engaging skilled naval architects to advise him and skilled inspectors to supervise the work with due diligence. In his judgment Wright J. said[7]: "Under the old rule the only relevant question was whether the "ship was seaworthy or unseaworthy. That rule was no doubt "well adapted to more simple days when ships were not very "complicated wooden structures of a few hundred tons, but in "modern times, when ships are complicated steel structures full "of complex machinery, the old unqualified rule imposed too "serious an obligation on carriers by sea, and I think that the

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[2] [1927] 2 K.B. 456; 43 T.L.R. 675.

[3] [1938] A.C. 57; 53 T.L.R. 944; [1937] 3 All E.R. 628.

[4] [1959] A.C. 604; [1959] 2 W.L.R. 331; [1959] 1 All E.R. 346.

[5] [1959] A.C. 604, 623.

[6] [1927] 2 K.B. 456.

[7] Ibid. 461.

"new Acts have intended to emphasise the specialisation which "has developed in modern times, and to emphasise the distinction between carrier and shipbuilder and limit the carrier's "obligation to due diligence in his capacity as carrier. He is to "be liable for all such duties as appertain to a prudent and "careful carrier acting as such by the servants and agents "in his employment. If he has a new vessel built he will "be liable if he fails to engage builders of repute and to adopt all "reasonable precautions. He may be held bound to require, "for instance, the builders to satisfy one of the well-known "classification societies, such as Lloyd's, or to engage skilled "naval architects to advise him and skilled inspectors to supervise the work. In the same way, if he buys a ship he may be "required to show that he has taken appropriate steps to satisfy "himself, by appropriate surveys and inspections, that the ship "is fit for the service in which he puts her. But I do not think "in any case that the carrier can be held guilty of want of due "diligence simply because the builders' employees have put in "some bad work which, though concealed, renders the vessel unfit.

"In the present case the defendants employed an inspector "to supervise the work. I have held that that inspector used "due diligence. It may well be that, if he had negligently passed "bad work which he saw, or even, perhaps, which he ought to "have seen, the carrier would be liable for want of due diligence "on the part of one to whom he had delegated the task of "inspecting the work, although such supervision, it may be, "cannot be other than general or go to every detail of the workmanship. Similarly, the carrier might perhaps be held liable "if the naval architect whom he employed to supervise the "design, applying current standards, failed to detect a definite "error in design, although I do not think that he would be so "liable for an error on the part of one of the classification "societies, such as Lloyd's, which occupy a public and quasi-"judicial position. He might also be liable if, either personally "or by his scientific advisers, he chose a special form of construction which involved, according to current standards, a known "risk—for example, if he chose to dispense with a cofferdam so "as to increase his cargo space although the best opinion thought "a cofferdam necessary. Again, the need for repairing a ship "may cast on the carrier a special duty to see, as far as reasonably possible, by special advisers for whom he is personally "responsible, that the repairs adequately make good the defects."

I have read that passage at length because it seems to me to illustrate the correct approach. There may be infinite variations of facts and whether in a particular situation the carrier has exercised due care will be a question of fact. But it is to be observed from the passage quoted that the carrier was not held guilty of want of due diligence simply because the builders' men put in bad work which, though concealed, rendered the vessel unfit. The carrier could prove that he had exercised due diligence even though there was a want of it on the part of the builders' men. But, as Wright J. pointed out, there might be cases, where ship building is being done for a carrier or where ship repairing is being done for a carrier, in which supervision during the work or inspection after the work would be necessary or desirable. In such cases the inspector or special adviser would be the delegate of the carrier to perform one part of the carrier's duty to exercise due care. In such cases if the inspector or special adviser failed to exercise due diligence, that would be the failure of the carrier or a failure for which he would be liable.

I can see no distinction in essential principle, though perhaps much when facts come to be regarded, between cases where a ship is being built for a carrier and cases where a ship is being repaired or is being surveyed for a carrier.

It seems to me that in the last sentence of the passage which I have quoted above, Wright J. was saying that if a carrier is having repairs effected to his ship it may be necessary for him to appoint special advisers, for whom he would be "personally "responsible," to make a check to see that the repairs have been properly effected. This shows that the question as to what the exercise of due diligence demands is a question of fact depending on the circumstances. The sentence, though not strictly a part of the reasons for the decision, suggests that the carrier would not necessarily be liable for the negligence of the repairers. Wright J. had pointed out earlier[8] that: "The obligation of the "carrier to exercise due diligence to make the ship fit is clearly "not limited to his personal diligence." If in certain circumstances, when repairs are being effected, the exercise of due diligence requires that there should be a check on the repairer's work, the carrier would be "personally responsible" for the special advisers employed to make such check.

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[8] [1927] 2 K.B. 456, 460.

In each particular set of circumstances it will be a question of fact as to what steps and measures a carrier should take in order to exercise due care and diligence to make his ship seaworthy: it will be a further question of fact as to whether he has done all that he should. But there may be situations in which good and prudent practice and the exercise of due diligence will warrant a carrier in entrusting some particular work to skilled and competent people who are not his servants so that even if there is some failure or negligence on their part, there will, nevertheless, have been an exercise of due diligence on his part. On the facts as found by the judge the present case is, in my judgment, an example of such a situation.

Is there then any authority which casts doubt on this conclusion? There was a passage in the speech of Lord Wright in *Wilsons & Clyde Coal Co.* v. *English*[9] which might have been thought to do so. It is quoted by Viscount Simonds in his speech in *Davie* v. *New Merton Board Mills Ltd.*[10] But we now have the pronouncements of their Lordships in that case. Taking the facts as found by McNair J., and they are not challenged, the question is: Are the respondent shipowners responsible in law for the negligence of the fitter?

If the fitter had been the servant of the respondents, the position would have been different. In *G. E. Dobell & Co.* v. *Steamship Rossmore Co.*[11] a shipowner was held responsible for the failure of the ship's carpenter to close a porthole, the closing of which was necessary in order to ensure the seaworthiness of the ship. In that case the contract incorporated the clauses of the Harter Act and it was argued that the provisions of clause 3 referred only to the exercise of due diligence by the owners themselves and not to the diligence of agents or servants. It was held, however, that the clause did not only refer to due diligence by an owner personally but to due diligence by him and his agents whom he employs to act for him. The precise problem with which we are concerned in the present case did not, however, arise in that case. But it must be recognised that just as a carrier will probably not be a shipbuilder and may, subject to whatever checks are in a particular case appropriate, place reliance upon a shipbuilder and the shipbuilder's men, so also a carrier may, subject to whatever checks are in a particular case appropriate, entrust repairs or renewals or overhauls or surveys

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[9] [1938] A.C. 57, 78.

[10] [1959] A.C. 604, 622.

[11] [1895] 2 Q.B. 408.

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to those who are skilled in the work that is entailed and may place reliance upon such persons. In such a situation there is no delegation by a carrier of his duty but a performance by him of his duty.

The duty resting upon the carrier to exercise due diligence is one of which he cannot divest himself. In deciding what the exercise of due diligence requires, a carrier may act, or may have to act, by servants or agents: it is the carrier then who, by his servants or agents, is acting. As Wright J. pointed out in his judgment in the *Angliss* case, a carrier may be a company and in any case in the complication of modern affairs and by reason of the widely scattered situation of seaports, he must act by agents or servants.

In his speech in *Davie's* case Viscount Simonds said [12]: "No "one doubts that an employer cannot escape liability by appointing an agent to perform the employer's obligation on his behalf." If I may most respectfully say so, that states the matter very clearly.

A similar approach, as it seems to me, is shown in some words used by Lord Wright in his speech in *Northumbrian Shipping Co. Ltd.* v. *E. Timm & Son Ltd.*[13] Lord Wright said: "The "obligation to make a ship seaworthy is personal to the owners, "whether or not they entrust the performance of that obligation "to experts, servants or agents." If owners choose to entrust to others, be they experts or servants or agents, the duty which the owners must themselves discharge, then the owners are liable if their delegates fail to do what it is incumbent on the owners to do. But that is not to say that in some circumstances, depending upon their particular facts, owners (or those acting for owners) may not be able to discharge their duty by planning and organising and setting in train certain works or operations without being accountable for each and every fault of every person who may play any part in such works or operations. The carrier cannot wash his hands of his duty to exercise due diligence by passing it on to someone else, however competent. The duty remains. But that does not involve that if the duty of exercising due diligence is fully and faithfully performed and discharged, there is inevitably a liability for any and every negligent act of anyone who may take a part in some work which has to be done.

In line with the words of Viscount Simonds in *Davie's* case were the words of Lord Morton of Henryton[14] and of Lord Tucker[15] and Lord Keith.[16] Lord Tucker said: "It may well "be that in some cases the employer may delegate the perform- "ance of his obligations in this sphere to someone who is more "properly described as a contractor than a servant, but this will "not affect the liability of the employer, he will be just as much "liable for his negligence as for that of his servant. Such a "contractor is entrusted by the employer with the performance "of the employer's personal duty. But this does not mean that "every person with whom the employer may have entered into "some contractual relationship connected with the manufacture "or supply of some machinery, appliance or tool which is ulti- "mately used in his business automatically becomes a person "entrusted by the employer with the performance of his common "law duty. Still less can the negligence of some person with "whom the employer has never been in contact contractually or "otherwise, or of whom perhaps he has never even heard, be "imputed to him." In my judgment that passage has relevance, mutatis mutandis, to the case of a carrier, who is under a duty to exercise due diligence to make his ship seaworthy. It must also be remembered that if a ship is undergoing a survey or an overhaul, there will often and in different ways be a necessity to purchase some new fittings or new structural material.

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[12] [1959] A.C. 604, 621.

[13] [1939] A.C. 397, 403; 55 T.L.R. 770; [1939] 2 All E.R. 658.

If a repairer purchased some new part from a reputable supplier and then fixed such part in position in a ship and if the ship became unseaworthy because the new part had been negligently made by the supplier, although apparently satisfactory, I consider, unless the circumstances pointed to the necessity for some examination or test, that it would be open to a court to hold that the owner of the ship had exercised due diligence to make the ship seaworthy and that he would not necessarily be accountable by reason of the negligence of the supplier.

Though in *Davie's* case the negligent manufacturer stood in no contractual relation to the employer and though the action was founded in tort, the speeches afford guidance to us in the present case because they analyse certain judicial pronouncements concerning the circumstances under which there may be responsibility for the acts of "independent contractors."

It is to be observed that Lord Morton's conclusion would have been just the same if the employers had bought direct from the manufacturers[17]: so also would have been Lord Tucker's conclusion.[18] There is, I think, an analogy between a duty to take reasonable care to provide proper appliances and a duty to exercise due diligence to make a ship seaworthy. The content of the duty will vary according to the circumstances of each case but the measure of the duty is the same. I can see no practical distinction for present purposes between the phrases " due diligence " and " reasonable care."

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[14] [1959] A.C. 604, 629.

[15] Ibid. 646.

[16] Ibid. 652.

Viscount Simonds[19] expressed his approval of what Lord President Normand had said in the Court of Session in the *Wilsons & Clyde Coal Co.* case in regard to *Bain* v. *Fife Coal Co. Ltd.*[20] Viscount Simonds said: " There is an illuminating passage in the " judgment of the Lord Justice-Clerk in *Bain*, who there asserted " it to be a fundamental doctrine of the law of master and " servant that there are certain duties owed by a master to his " servant so imperative and vital to safety that the master cannot " divest himself of responsibility by entrusting their performance " to others, so as to avoid liability in the event of injury arising " to the servant through neglect of any of those duties. ' I agree,' " said Lord Normand, ' with this opinion, subject to the explana- " ' tion, which is to be gathered from the context, that, when " ' delegation to others is spoken of, it is delegation to servants " ' that is meant.' It is legitimate, therefore, to approach " *Wilsons'* case with the warning that anything said about the " default of any person other than the employer and his servants " cannot be regarded as relevant to the decision."

The analysis by Viscount Simonds[21] of what Lords Wright and Maugham said in *Wilsons'* case is all of great materiality in the present case, though Viscount Simonds pointed out that in *Davie's* case the manufacturer could not vis-à-vis the employer be regarded as an " independent contractor." Viscount Simonds[22] said: " As I have already said, a large number of authorities " were cited to us, many of them relating to the liability of an " employer, or more often of an occupier of land, for the default " of an independent contractor. It may one day fall to the " House to explain and, perhaps, to reconcile these cases. It is " not the occasion for that task when the fault lies at the door of " one who was not an ' independent contractor,' however wide a " meaning may be given to those words."

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[17] [1959] A.C. 604, 629.

[18] Ibid. 648.

[19] Ibid. 622.

[20] 1935 S.C. 681.

[21] [1959] A.C. 604, 622, 623, 624.

[22] Ibid. 626.

Lord Reid also analysed *Wilsons'* case and pointed out that in that case there was no question of the company being liable for the negligence of some person who was not their servant. He also pointed out that there was nothing in the speeches of Lord Thankerton or of Lord Macmillan or in the opinions in the Court of Session, which latter were approved in the House of Lords, to suggest any intention to deal with the question whether an employer is in any way liable for the negligence of any person who is not his servant. After reviewing what Wright J. said in *Angliss'* case, and what Lord Wright said in *Wilsons'* case, Lord Reid said[23]: "Lord Wright had the nature of the vicarious "liability of a shipowner sufficiently in mind to enable him to "select this as an appropriate analogy to the vicarious liability "of an employer to his servant, and it seems to me impossible "that he could at the same time have forgotten his judgment in "*Angliss* and equally impossible that he would have said no "more than he did in *Wilsons & Clyde* if he had come to think "that his judgment in *Angliss* was wrong. He certainly thought "that a master (or a shipowner) would in some cases be "vicariously liable for the negligence of a person who was not in "law his servant. But he thought that a shipowner would not "be vicariously liable for the shipbuilder's negligence; and by "parity of reasoning he must have taken the same view about a "master's liability in respect of plant which he had purchased. "I cannot avoid the conclusion that, if the facts of the present "case had been put before him in 1938, he would have decided "in favour of the present respondents." In similar manner I am of the opinion that if the facts of this present case had been before Wright J. in 1938, he would have decided it in favour of the present respondents.

Lord Reid examined the words used by Lord Maugham in *Wilsons'* case and concluded[24]: "It appears to me, therefore, "to be at least doubtful whether Lord Maugham would have held "an employer vicariously liable for the negligence of a manufac- "turer from whom he had bought plant or machinery."

After a review of the authorities, including *Thomson* v. *Cremin*,[25] Lord Reid said[26]: "The conclusion to which I have "come is that an employer, besides being liable to his servant for "injury caused by the negligence of his own servants, is in some

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[23] [1959] A.C. 604, 634.
[24] Ibid. 636.
[25] [1956] 1 W.L.R. 103n.; [1953] 2 All E.R. 1185.
[26] [1959] A.C. 604, 645.

"cases liable in respect of the negligence of others. Where, "then, is the line to be drawn? On the one hand, it appears that "an employer is liable for the negligence of an independent con-"tractor whom he has engaged to carry out one of what have "been described as his personal duties on his own premises and "whose work might normally be done by the employer's own "servant—at least if the negligent workmanship is discoverable "by reasonable inspection. On the other hand, for the reasons "which I have given, I am of opinion that he is not liable for "the negligence of the manufacturer of an article which he has "bought, provided that he has been careful to deal with a "seller of repute and has made any inspection which a reasonable "employer would make. That leaves a wide sphere regarding "which it is unnecessary, and it would, I think, be undesirable, "to express any opinion here. Various criteria have been sug-"gested and it must be left for the further development of the "law to determine which is correct."

Lord Keith agreed with the analysis made by Viscount Simonds and Lord Reid of the opinions expressed in *Wilsons'* case and Lord Keith said [27]: "Granted that in certain circumstances he "may be responsible for the negligence of persons who may be "described as independent contractors in the performance for him "of his common law duties, where does his liability for negligence "in the chain of performance end? The answer made by appel-"lant's counsel is, nowhere, for the only excuse which he "accepts is latent defect arising without negligence in manu-"facture and which could not be discovered by the maker of the "instrument in which the defect existed. This need not, and in "the present case does not involve negligence in a chain of delega-"tion and sub-delegation for here there was nothing but a "purchase of a tool from a reputable wholesale supplier of tools. "For all practical purposes the appellant's case involves that an "employer is bound to warrant the sufficiency and safety of the "tools used by his servants."

Lord Keith also said [28]: "The duty of a master in supplying "a servant with plant or material cannot, in my opinion, be "placed higher than a duty to exercise reasonable care to see "that the plant or material is safe for the purpose for which it is "intended and he cannot be liable, except in a proper case of "delegated performance, for the negligence of someone other "than himself in the provision of that plant or material. I find

[27] [1959] A.C. 604, 652.

[28] Ibid. 653.

"it unnecessary to consider whether that liability can extend "further than one remove in a chain of delegation. Purchase by "a master from a wholesale or retail merchant, without more, "is not, in my opinion, an instance of delegation. It is perform-"ance by the master himself."

Although the decision in *Davie's* case does not in any way conclude the question raised in the present appeal, the speeches there made do not lend any favour to the view that if the carriers exercised due diligence in the particular circumstances of this case by entrusting certain work to independent contractors of the highest repute, they are answerable for some act of undiscoverable negligence on the part of a servant of the independent contractors. There was no delegation of the carriers' duty to the independent contractors: there was a discharge by the carriers of their duty by various acts which included calling upon the skilled services of the independent contractors.

In the judgment of the Privy Council in *Paterson Steamships Ltd.* v. *Robin Hood Mills Ltd.*[29] it was said in reference to the exercise of due diligence to make a ship seaworthy that: "The "condition is not fulfilled merely because the shipowner is per-"sonally diligent. The condition requires that diligence shall in "fact have been exercised by the shipowner and those whom he "employs for the purpose—see *Dobell* v. *Steamship Rossmore* "*Co.*"[30] The reference to the *Rossmore* case was, therefore, to a case which concerned the negligence of a servant. So also in the recent judgment of the Privy Council in *Maxine Footwear Co. Ltd.* v. *Canadian Government Merchant Marine Ltd.*,[31] where those words were cited, a failure on the part of the fourth officer to exercise due diligence was failure on the part of a servant.

On behalf of the appellant cargo-owners it was powerfully submitted that in American or English cases which were concerned with the Harter Act, and in English cases dealing with the Hague Rules, there could be discerned a current of authority supporting the view that all those who may be engaged in the work of making a ship seaworthy must be regarded as the delegates of the carrier in carrying out his obligation. It was submitted that the decision now under appeal involves a complete reversal of what has been a consistent line of approach. Reference was made to certain expressions of opinion by the editors of the 12th and 13th editions of Scrutton on Charterparties, as well as to the judgment in this court in *Dobell's* case,[32] to the words of Wright J. in *Angliss'* case,[33] and of Lord Wright in *Wilsons'* case,[34] and in the *Northumbrian Shipping* case [35] and in *Paterson Steamships Ltd.* v. *Canadian Co-operative Wheat Producers Ltd.*[36] Reference was also made to passages in other cases, including *Smith, Hogg & Co. Ltd.* v. *Black Sea and Baltic General Insurance Co. Ltd.*,[37] *International Packers Ltd.* v. *Ocean Steamship Co. Ltd.*[38] and *Waddle* v. *Wallsend Shipping Co. Ltd.*[39] I have referred above to certain passages from the judgments and speeches of Lord Wright. To these passages I may add the following words from his speech in *Smith, Hogg & Co. Ltd.* v. *Black Sea and Baltic General Insurance Co. Ltd.*[40]: "The unseaworthiness, constituted as it was by loading an excessive deck cargo, was obviously only consistent with want of due diligence on the part of the shipowner to make her seaworthy. Hence the qualified exception of unseaworthiness does not protect the shipowner. In effect, such an exception can only excuse against latent defects. The overloading was the result of overt acts."

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[29] [1937] W.N. 189; 58 Ll.L.Rep. 33, 40.

[30] [1895] 2 Q.B. 408.

[31] [1959] A.C. 589; [1959] 3 W.L.R. 232; [1959] 2 All E.R. 740.

The various passages from judgments to which I have referred are strongly relied upon by the appellants, and when marshalled in sequence are said to reveal a steady and consistent line of authority supporting the view that all persons taking part in the work or operations connected with making a ship seaworthy must be regarded as the delegates of the shipowner or carrier, so that, if the ship is unseaworthy as a result of a negligent act on the part of any one of them, the shipowner or carrier has, per alios, failed to exercise due diligence to make the ship seaworthy. But it is to be noted that the issue raised in the present appeal was not effectively raised in the cases relied upon. In the *Angliss* case it was, however, clearly held that the carrier was not to be held guilty of want of due diligence simply because the builder's employees had put in some bad work which, though concealed, rendered the ship unfit. Some of the passages relied upon by the appellants are passages which, when analysed, are seen to have reference to servants. That appears from the speeches in *Davie's* case. Other passages when analysed show that the duty cast upon the carrier under article III, rule 1, is a personal duty of the carrier so that he cannot escape liability by appointing someone to perform his obligation on his behalf. But I do not read any of the passages as laying it down that there cannot ever be circumstances under which a carrier may be free from liability for some act of negligence on the part of someone doing work on his ship, even though he can show that he has made arrangements of a kind reasonably made by carriers in circumstances where work may be entrusted to independent contractors.

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[32] [1895] 2 Q.B. 408.
[33] [1927] 2 K.B. 456.
[34] [1938] A.C. 57.
[35] [1939] A.C. 397.
[36] [1934] A.C. 538, 547.
[37] [1940] A.C. 997; 56 T.L.R 893; [1940] 3 All E.R. 405.
[38] [1955] 2 Lloyd's Rep. 218.
[39] [1952] 2 Lloyd's Rep. 105.
[40] [1940] A.C. 997, 1001.

It is neither necessary nor desirable to seek to formulate some test by reference to which it can be decided whether a carrier has performed his duty or whether he has delegated it. We are concerned only with the facts of the present case, and on the facts as found I consider there was a discharge by the respondents of their duty.

We were referred to a number of American cases and to expressions used in the judgments. Thus, in *The Mary L. Peters* [41] it was held that there was no such evidence of due diligence on the part of the owner or of those who represented him on the inspection and the repair of a ship before she sailed as would exempt the ship under the Harter Act. So in *The Colima* [42] it was said that there must be due diligence in the work itself, and there was a reference to agents to whom a carrier may have committed the work of fitting a ship for sea. In *Nordeutsche Lloyd* v. *President Insurance Co. of America* [43] it was said that due diligence must be adequate to the occasion and must be in the work itself and not merely in the selection of agents to do the work, for if it were the latter, carriers might escape all responsibility.

These and other cases all confirm that a carrier does not evade his duty either by choosing competent servants or agents or by delegating performance to others, but I am not persuaded that the cases establish that there cannot be cases in which, on their particular facts, certain persons preparing a ship for sea are neither the servants or the agents nor the delegates of the carrier. It does not seem to me that the construction of article III, rule 1, of the Hague Rules presents any difficulty. The words are clear. The duty is defined. The duty is imposed upon the carrier. It is for him to discharge it. The rule is mandatory. The duty is unqualified. The only question in the present case is whether it was performed.

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[41] (1895) 68 Fed. 919.

[42] (1897) 82 Fed. 665.

[43] (1901) 110 Fed. 420.

Independent contractors engaged to do work on the ship may themselves arrange for sub-contractors to do certain work. Are all those who are employed by independent contractors and their sub-contractors to be regarded as delegates of the carrier? If so, the obligation of the carrier becomes an obligation to make the ship as seaworthy as the exercise of due diligence can make it. That, however, is not the contractual obligation in this case. That would be in effect to impose upon the carrier all the obligations of a warranty of seaworthiness subject only to non-liability for latent defects. That also is not the contractual obligation in this case. If the carrier is to be liable for the negligence of all persons who have been engaged in doing anything to the ship, it would seem impossible to exclude those who have been engaged in building a new ship for a carrier. If everybody who has a hand in preparing a ship for a voyage so as to make her seaworthy is a delegate of the carrier, why should not every person who prepares a ship for her first voyage also be a delegate? And what persons are more intimately concerned in preparing a ship for such a voyage than those who build her? If it is said that the carrier is entitled to rely upon the expert skill of the shipbuilder, that is but to recognise that as a question of fact there may be circumstances in which the exercise of due diligence entitles a carrier to place dependence upon the skill of others without making those others his delegates for the exercise of the due diligence which he has contracted to exercise. As Wright J. pointed out in *Angliss'* case, a carrier may be a charterer of a ship or a purchaser of a ship, and in such cases the builders of the ships and the builders' men could not possibly be regarded as the servants or agents of the carrier. Nor could they possibly be regarded as the delegates of the carrier. If in the present case the position had been that the *Muncaster Castle* had been purchased by a purchaser in March, 1953, prior to the sailing to Australia, and if the purchaser had received assurances that the special survey and the load-line survey had been properly carried out, I cannot think that the purchaser would be responsible for the negligence of the fitter. In such a situation it would be a question of fact as to whether any special steps should have been taken by the purchaser in the exercise of his obligation of due diligence as a carrier. On the facts of this case it is shown that no visual examination of the inspection covers would have revealed any unevenness in their positioning.

The speech of Viscount Simonds in *Davie's* case points a warning against any ardent resort to analogies. In this field analogies will only furnish a guide or a corrective if there is some duty or obligation which is of like nature to that now being considered. For this reason I do not find guidance in such cases as *Grote* v. *Chester and Holyhead Railway Co.*[44] or *Francis* v. *Cockrell*[45]: the duties owed in the former case to a passenger on a railway that crossed a bridge, and in the latter to one who paid money to occupy a seat on a stand, differed from the duty resting upon the carrier in the present case. The duty of an employer to an employee bears a closer resemblance. Hence, it is indeed significant to note that an employer, being under a duty to take reasonable care to provide a reasonably safe tool for his employee, is not liable for the bad workmanship, undiscoverable by him, of the employees of the manufacturer of a tool which the employer purchases.

Some other situations in which there is a duty to take reasonable care provide illustrations of the fact that such measure of care may be taken without attracting responsibility for the negligence of someone whose work and services have been sought. Thus, in *Phillips* v. *Britannia Hygienic Laundry*,[46] while the defendants' motor-lorry was being driven in a public highway, a wheel came off and damaged the plaintiff's van. The wheel came off owing to a defect in the axle. The defendants had sent the lorry to the makers of it, a firm of known competence, to be overhauled and repaired. The makers were negligent in not having replaced the defective axle. The lorry was only received back from the makers two days before the accident. It was held that the defendants were not liable for the negligence of the makers, and that the plaintiff could not recover, inasmuch as he had failed to establish knowledge or negligence on the part of the defendants. In his judgment in that case Bailhache J. said[47]: "The remaining point is that there is a common law duty "on the owner of a motor-vehicle to have it reasonably fit for the "road. In my judgment that is not a correct statement of the "duty. Correctly stated the duty is to take reasonable care that "the motor-vehicle shall be fit for the road. That is quite a "different thing from the duty to have it reasonably fit for the "road. If the duty were to have it reasonably fit for the road "it might well be that, although the owner of the vehicle had "entrusted his repairs to a competent repairer, he would be liable

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[44] (1848) 2 Exch. 251.

[45] (1870) L.R. 5 Q.B. 501.

[46] [1923] 1 K.B. 539; 39 T.L.R. 207.

[47] [1923] 1 K.B. 539, 556.

"to a person who suffered injury upon the high road if the "competent repairer were negligent. If, on the other hand, "the duty is, as I hold it is, to take reasonable care to have his "vehicle fit, then that duty is discharged by the owner of "the vehicle who puts it into the hands of a competent repairer "with instructions to do what is necessary to put it in a fit state "to use on the road." (See also *Stennett* v. *Hancock*.[48])

In the well-known case of *Haseldine* v. *C. A. Daw & Son Ltd.*[49] it was held that where there was an obligation on a landlord to take care that a lift was reasonably safe, a landlord fulfilled that obligation by employing a competent firm of engineers to make periodical inspections of the lift, to adjust it and to report on it. Scott L.J. said[50]: "The invitor is bound "to take that kind of care which a reasonably prudent man in "his place would take—neither more nor less." Goddard L.J. said[51]: "Towards an invitee the occupier has the duty of taking "care that the premises are reasonably safe. I need not quote "the classic passage from the judgment of Willes J. in *Indermaur* "v. *Dames*,[52] but he there points out that whether reasonable "care has been taken is to be determined as a matter of fact. "It seems to me that, by employing a first-class firm of lift "engineers to make periodical inspections of the lift, to adjust "it and to furnish reports upon it, the landlord did all that a "reasonable man could do towards seeing that it was safe, especially when it is remembered that he also had the advantage "of quarterly inspections by the insurance company's engineer. "But it is argued that, if the engineers were negligent, it cannot "be said that the occupier has discharged his duty. With this "I cannot agree. An occupier or any other person may have, "either by contract or by law, such a degree of duty imposed on "him that he cannot discharge it by employing a contractor to "do work for him, but where the duty is to take care that the "premises are safe, I cannot see how it can be discharged better "than by the employment of competent contractors. Indeed, one "may well ask how otherwise could the duty be discharged?"

If other obligations than those of a carrier under the Hague Rules or other situations than that relating to carriage of goods by sea are being referred to, it must at all times be remembered that in the present case we are concerned with a definitely defined obligation. It is only if other obligations are comparable that cases are helpful which illustrate that there may be some circumstances in which the obligation to take reasonable care or to exercise due diligence may be discharged by placing dependence upon experts or those possessed of technical skill (or special knowledge or experience). Thus, *Haseldine* v. *C. A. Daw & Son Ltd.*[53] illustrates a situation in which a duty was discharged in that way, whereas *Woodward* v. *Mayor of Hastings*[54] illustrates a situation in which a duty to be discharged called for no such dependence. There was no " esoteric quality " in the nature of the work which the cleaning of snow from a step demanded.

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[48] [1939] 2 All E.R. 578.

[49] [1941] 2 K.B. 343; 58 T.L.R. 1; [1941] 3 All E.R. 156.

[50] [1941] 2 K.B. 343, 356.

[51] Ibid. 374.

[52] (1866) L.R. 1 C.P. 274, 288.

Though a consideration of other obligations which exist in other circumstances may yield valuable illustrations of principle, I consider that the present case falls to be decided according as to whether the carriers delegated the performance of their duty or whether they themselves performed and discharged their duty. The negligent fitter was not their servant, and there is no room for the application of the principle respondeat superior. I see no reason why, on the particular facts of this case, it was not proper to hold that the carriers did exercise reasonable care to make the ship seaworthy.

I would, therefore, dismiss the appeal.

Ormerod L.J. (read by Willmer L.J.). I have had the opportunity of reading the judgment which has just been delivered by Morris L.J. and the one about to be delivered by Willmer L.J. I am in full agreement with the views there expressed, and have not, therefore, a great deal to add.

The question at issue is a short one, although it has involved a good deal of argument and the citation of numerous authorities. The facts as found by the judge are not in issue and the question to be decided is whether the respondents have discharged the burden, which is undoubtedly upon them, of proving that they exercised due diligence to make their ship seaworthy.

[His Lordship stated the facts and continued:] It is common ground that the two covers in question were not properly screwed down, with the result that although they remained watertight on the outward voyage, they allowed water to enter the hold when the ship was homeward bound. The learned judge found, and the appellants do not dispute, that it was the ordinary and prudent practice for the covers to be replaced by a fitter without supervision, and that once the nuts holding down the inspection covers have been hardened up, no visual inspection would detect any unevenness of the cover or any insufficiency in the hardening up. On these facts the judge came to the conclusion that the respondents had exercised due diligence to make the ship seaworthy, and it is from this decision that the cargo owners have appealed. The appellants in their pleadings and at the trial made other allegations of unseaworthiness, but the insufficient screwing down of the storm-valve covers is the only ground which has been considered in this appeal. It is not in dispute that the ship was unseaworthy in this respect, and that the appellants' loss resulted therefrom.

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[53] [1941] 2 K.B. 343.

[54] [1945] K.B. 174.

The bill of lading was expressed to have effect subject to the provisions of the rules in the schedule to the Australian Sea Carriage of Goods Act, 1924, which are in identical terms with the corresponding provisions in the British Carriage of Goods by Sea Act, 1924. The relevant articles are article III (1) and (2) and article IV (1). The effect of these articles, so far as they relate to the issues with which this appeal is concerned, is that it is the duty of the carrier to exercise due diligence to make his ship seaworthy and properly and carefully to stow, carry, keep and care for the goods carried. He is not, however, liable for loss or damage arising or resulting from unseaworthiness unless caused by want of due diligence on his part to make the ship seaworthy. The burden of proving the exercise of due diligence is on the carrier. The judge, after finding that the most probable cause of the admission of sea water on the homeward voyage was the defective condition of the two inspection covers, went on to say[55]: "This finding is sufficient to support the "plaintiffs' first allegation of unseaworthiness; but I am also "satisfied that unless the defendants are in law responsible for "the negligence of the fitter, as I have found it, they have "discharged the onus of proving the exercise of due diligence "so far as concerns the inspection covers." These words express in a succinct manner the sole question in issue. The appellants' contention is that the obligation to exercise due diligence, which is placed upon the shipowner by article III, rule (1), is a personal obligation which cannot be delegated. It was argued that the responsibility would remain on the shipowner if, as in this case, there was a want of care on the part of an employee of an independent contractor appointed to do work on the ship which,

[55] [1959] 1 Q.B. 86.

in the ordinary way, would not and probably could not be performed by the shipowner. It is not disputed by the respondents that they would be responsible for unseaworthiness due to a lack of care on the part of their own employees, or by an agent employed by them for the purpose of seeing that the work of inspection and repair was done. If, for example, Atkinson had been negligent in the performance of his duties of supervision and unseaworthiness of the ship resulted, there can be no doubt that the respondents would have been liable. The appellants, however, go further, as indeed they must if they are to succeed in this appeal, and as I have said have contended with much force that the responsibility still remains in the respondents although the negligence was that of an employee of the independent contractor. If I am not constrained by authority to hold otherwise, I have little difficulty in coming to the conclusion that the respondents have discharged the burden which is upon them.

If the appellants' contention is sound, it means that a shipowner must warrant the seaworthiness of a ship except in the rare case of a latent defect which no reasonable examination could discover. It is to be remembered that, according to the relevant article, the duty on the carrier, before and at the beginning of the voyage, is to exercise due diligence to make the ship seaworthy. It is not his duty to ensure that due diligence has been exercised. It is his diligence which is in question, the responsibility for exercising which remains in him, although much of the work falls to be performed by his servants and agents. But it is straining the language of the article much too far to hold that when work of repair and inspection, which cannot be done by the shipowner, is given under contract to a firm of shipbuilders, admittedly of the highest repute, the shipowner can be said to be failing in his duty to exercise due diligence if, as in this case, unseaworthiness results by reason of the negligence of a fitter employed by the contractor, the effects of which are not discoverable by any reasonable inspection. By entering into a contract with a reputable firm of ship repairers for the doing of the necessary work under the supervision of a competent and experienced agent, the respondents acted in performance of their duty exercising due diligence. They did not, in my judgment, delegate such performance to the ship repairers. If the appellants are right in their contention, the results would be far-reaching. It might well be necessary, for instance, for the repairers to purchase one or more components to replace worn or damaged parts of the mechanism of the ship. If the appellants are right, the employers' obligation would, it seems, extend to liability due to faulty workmanship in these components, although they were of approved design and purchased from manufacturers of repute. They might even be held liable for defective workmanship in the building or earlier repair of the ship, although such repair was done before the ship came into their ownership and was not discoverable by any reasonable inspection.

The appellants contended that there was a continuous stream of authority both in the English and the American courts to support their submission. The cases have already been examined carefully by Morris L.J., and I am in full agreement with the conclusions at which he has arrived with regard to them. I do not propose, therefore, to enter into a further examination of them, and content myself with the observation that in so far as any of these authorities are binding on this court, they do not support the appellants' contention that the shipowners are in breach of their obligation, even although the lack of diligence complained of is that of an employee of an independent contractor.

There is not, therefore, in my judgment, any sufficient authority to lead me to a conclusion other than the one I have already expressed. But there is authority which supports that conclusion. The learned judge in coming to his conclusion relied chiefly on *W. Angliss & Co. (Australia) Pty.* v. *P. & O. Steam Navigation Co.*,[56] which was one of the earliest decisions under the Act of 1924. It was a case where the plaintiff's goods were damaged by oil fuel or the fumes thereof from an oil fuel bunker owing to a defective deck bar. Wright J. found that the design of the bar and its fitting was inadequate, but that, having regard to the then state of knowledge and experience of the use of oil fuel, there was no failure of due diligence on the part of those concerned. But he held also that there was bad workmanship both in riveting and fitting the bar which was the fault of individual workmen employed by the builders, and could not have been detected by reasonable care on the part of those whose duty it was to inspect the work. Having found these facts, the judge went on to state the legal position and the history and development of the Act, and went on to say[57]: " . . . I think that the " new Acts have intended to emphasise the specialisation which " has developed in modern times and to emphasise the distinction

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[56] [1927] 2 K.B. 457.

[57] Ibid. 461.

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"between carrier and shipbuilder and limit the carrier's obligation "to due diligence in his capacity as carrier. He is to be liable "for all such duties as appertain to a prudent and careful "carrier acting as such by the servants and agents in his "employment. If he has a new vessel built he will be liable if "he fails to engage builders of repute and to adopt all reasonable "precautions. He may be held bound to require, for instance, "the builders to satisfy one of the well-known classification "societies, such as Lloyd's, or to engage skilled naval architects "to advise him and skilled inspectors to supervise the work. In "the same way, if he buys a ship he may be required to show "that he has taken appropriate steps to satisfy himself by "appropriate surveys and inspections that the ship is fit for the "service in which he puts her. But I do not think in any case "that the carrier can be held guilty of want of due diligence "simply because the builders' employees have put in some bad "work which, though concealed, renders the vessel unfit.

"In the present case the defendants employed an inspector "to supervise the work. I have held that that inspector used due "diligence. It may well be that, if he had negligently passed bad "work which he saw, or even, perhaps, which he ought to have "seen, the carrier would be liable for want of due diligence on "the part of one to whom he had delegated the task of inspecting "the work, although such supervision, it may be, cannot be "other than general or go to every detail of the workmanship. "Similarly, the carrier might perhaps be held liable if the naval "architect whom he employed to supervise the design, applying "current standards, failed to detect a definite error in design, "although I do not think that he would be so liable for an error "on the part of one of the classification societies, such as "Lloyd's, which occupy a public and quasi-judicial position. He "might also be liable if, either personally, or by his scientific "advisers, he chose a special form of construction which involved, "according to current standards, a known risk—for example, if "he chose to dispense with a cofferdam so as to increase his "cargo space although the best opinion thought a cofferdam "necessary. Again, the need of repairing a ship may cast on the "carrier a special duty to see, as far as reasonably possible, by "special advisers for whom he is personally responsible, that the "repairs adequately make good the defects."

The decision has been followed frequently in other cases, and as McNair J. put it in his judgment[58]: "I have no doubt that

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[58] [1959] 1 Q.B. 86, 91.

" the innumerable disputes between shippers and cargo owners " have been settled on the basis of this judgment." I find it difficult to see any distinction between the case where the employee of the shipbuilder has been negligent, and the present case where the negligence is that of an employee of the repairers. If the decision in the *Angliss* case be right, then it is, in my view, ample authority to support the respondents' contention in this appeal.

The decision has recently been the subject of consideration by the House of Lords in *Davie* v. *New Merton Board Mills Ltd.*,[59] who decided that the respondent employers, being under a duty to take reasonable care to provide a reasonably safe tool, had discharged that duty by buying from a reputable source a tool whose latent defect they had no means of discovering. In the course of the argument the appellant relied considerably on some observations of Lord Wright in *Wilsons & Clyde Coal Co.* v. *English.*[60] Reference has already been made to the relevant passages in the speech of Lord Wright, and I do not propose to repeat them except to draw attention to one passage[61]: " But in " truth the employer's obligation, as it has been defined by this " House, is personal to the employer, and one to be performed by " the employer per se or per alios. If I may take an analogy " or instance of a similar personal obligation, I note that the " Carriage of Goods by Sea Act, 1924, requires a shipowner to " exercise due diligence or to take reasonable care to provide a " seaworthy ship. The shipowner is almost certainly not an " expert naval architect, engineer, or stevedore. So far as I " know it has never been claimed that this obligation is fulfilled " by the shipowner taking reasonable care to appoint a competent " expert; the shipowner is absolutely held to the fulfilment of the " obligation. It is the obligation which is personal to him, and " not the performance."

Viscount Simonds in *Davie's* case was, I think, of the opinion that the decision of Wright J. in the *Angliss* case was right, but that Lord Wright, in making the observation to which I have referred in *Wilsons'* case, did so " with an imperfect recollection " of what he himself had decided in the earlier case." He then went on to say[62]: " And much as I distrust analogies, I would " add that there is a striking resemblance between the ship-" owner who is held not to be liable for the bad workmanship,

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[59] [1959] A.C. 604.
[60] [1938] A.C. 57.
[61] Ibid. 80.
[62] [1959] A.C. 604, 623.

"undiscoverable by him, of the shipbuilder's employees, and the "employer who claims not to be liable for the bad workmanship, "equally undiscoverable, of the employees of the manufacturer "who supplied at second-hand the tools with which he has "provided his workman." Lord Morton did not refer either to the *Angliss* case or to *Wilsons'* case, but he accepted the views expressed by Viscount Simonds in his review of the authorities. Lord Reid found himself able to reconcile the views of Wright J. in the *Angliss* case with those of Lord Wright in *Wilsons'* case. He said [63]: "Lord Wright had the nature of the vicarious "liability of a shipowner sufficiently in mind to enable him to "select this as an appropriate analogy to the vicarious liability of "an employer to his servant, and it seems to me impossible that "he could at the same time have forgotten his judgment in "*Angliss*, and equally impossible that he would have said no "more than he did in *Wilsons & Clyde* if he had come to think "that his judgment in *Angliss* was wrong. He certainly thought "that a master (or a shipowner) would in some cases be "vicariously liable for the negligence of a person who was not in "law his servant. But he thought that a shipowner would not "be vicariously liable for the shipbuilder's negligence: and by "parity of reasoning he must have taken the same view about a "master's liability in respect of plant which he had purchased. "I cannot avoid the conclusion that, if the facts of the present "case had been put before him in 1938, he would have decided "in favour of the present respondents."

Lord Tucker expressed his agreement with the views of Viscount Simonds and Lord Reid, as did Lord Keith, who referred with approval [64] to the judgment of Wright J. in the *Angliss* case.

Analogies, of course, are dangerous, and it may be that too much reliance should not be placed on the decision in *Davie's* case in considering the present appeal. But there can be no doubt in reading the opinions of their Lordships in that appeal that they all expressly or by implication approved the decision in the *Angliss* case and were of the opinion that nothing that was said by Lord Wright in *Wilsons'* case was intended to express any different view. I have already said that in my view the proper construction of the relevant articles is that there is no liability in this case on the shipowners. There is no contrary view expressed in the authorities as I read them, but there is, on the

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[63] [1959] A.C. 604, 634.

[64] Ibid. 651.

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other hand, the judgment in the *Angliss* case and its recent approval by their Lordships in *Davie's* case.

I agree that the appeal should be dismissed.

WILLMER L.J. The facts of this case are simple and are not now in controversy. The question is whether, on the facts found by the learned judge and now accepted, the shipowners discharged the burden, which lay upon them, of proving that they had exercised due diligence to make their ship, the *Muncaster Castle*, seaworthy. It is admitted that the vessel was in fact unseaworthy in that the inspection covers of the storm valves in No. 5 hold were so ineffectively screwed down that during the course of the relevant voyage sea water was enabled to enter the hold, whereby the plaintiffs' cargo was damaged.

[His Lordship stated the facts and continued:] On these facts the shipowners claimed that they had discharged their obligation to exercise due diligence to make the ship seaworthy, and on this, the only remaining issue in the case, the judge found in their favour. It is from this finding that the cargo-owners now appeal. The Australian Sea Carriage of Goods Act, 1924, like the corresponding Act in this country, provides that there shall not be implied in any contract for the carriage of goods by sea to which the Act applies any absolute undertaking by the carrier of the goods to provide a seaworthy ship. Carriage of goods to which the Act applies is made subject to the provisions of the Hague Rules, which, as in the English Act, are set out in a schedule. It is common ground that the carriage of the plaintiffs' cargo in the present case was subject to the provisions of the Hague Rules. Of these the two most material provisions for the purposes of this case are those contained in article III, rule 1, and article IV, rule 1. These have already been read, and I do not pause to read them again.

The argument for the cargo-owners is that the shipowners' obligation under article III, rule 1, to exercise due diligence to make the ship seaworthy is one which is personal to him, and one for which he cannot evade responsibility by delegating its performance to some other person, whether that other person be a servant, an agent or an independent contractor. The principle contended for cannot be expressed better than in the words of Lord Wright in *Wilsons & Clyde Coal Co.* v. *English*,[65] as follows: "The Carriage of Goods by Sea Act, 1924, requires a

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[65] [1938] A.C. 57, 80, 81.

"shipowner to exercise due diligence or to take reasonable care "to provide a seaworthy ship. The shipowner is almost certainly "not an expert naval architect, engineer, or stevedore. So far as "I know, it has never been claimed that this obligation is fulfilled "by the shipowner taking reasonable care to appoint a competent "expert; the shipowner is absolutely held to the fulfilment of the "obligation. It is the obligation which is personal to him, and "not the performance." Here, it is argued, the shipowners delegated to the ship repairers, Messrs. Alexander Stephen, the performance of their obligation to exercise due diligence to make their ship seaworthy, and having so delegated must accept their delegates' performance as their own. Accordingly, since owing to the negligence of the fitter the obligation was not performed, the shipowners cannot be heard to say that they discharged their personal obligation to exercise due diligence to make the ship seaworthy.

In rejecting this contention the judge was clearly of the view that the facts of the present case were covered in principle by the decision of Wright J. in *W. Angliss & Co.* v. *P. & O. Steam Navigation Co.*[66] That decision has never been overruled, and has more than once been followed; and McNair J. took the view that it has, since 1927, been accepted by the profession as stating the legal position authoritatively and accurately, forming the basis for the settlement of innumerable disputes between shipowners and cargo-owners during the last thirty years. In that case the ship in question had been specially built for the shipowners by competent shipbuilders, and the actual question in issue was as to the liability of the shipowners for damage caused or contributed to by bad workmanship on the part of some of the builders' workmen. In the course of his judgment, however, Wright J. took the opportunity to review the scheme of the, then new, Hague Rules, with particular reference to the shipowners' obligation to exercise due diligence to make the ship seaworthy. Counsel on both sides, in the present case, have found in what Wright J. said a good deal of material to support their respective arguments. The fact is that the present case raises a question not specifically answered in the *Angliss* case. The precise question in issue in the present case has never hitherto been the subject of express decision.

It is, however, argued on behalf of the cargo-owners that the principle for which they contend is supported by a long and consistent line of authorities, commencing with decisions, both English and American, under the American Harter Act, and including a number of dicta by judges of the highest eminence with regard to the effect of the Hague Rules. In examining decisions under the Harter Act it is well to remember (1) that under that Act the old absolute warranty of seaworthiness remained unaffected, and (2) that reliance on any of the exempting provisions was made conditional upon the shipowner proving the exercise of due diligence to make the ship seaworthy. Subject to that, however, it remains true to say that the words calling for interpretation here, namely, " due diligence to make the ship " seaworthy," are common to both the Harter Act and the Hague Rules. In *Dobell & Co.* v. *S.S. Rossmore Co.*[67]—a case in which the unseaworthiness complained of was in fact due to an act of negligence on the part of the ship's carpenter—Lord Esher M.R. stated the shipowner's duty under the Harter Act in terms which appear wide enough to support the principle now contended for. He said[68]: " The words of the third section, " which limit the owner's liability if he shall exercise due dili- " gence to make the ship in all respects seaworthy, must mean " that this is to be done by the owner by himself or the agents " whom he employs to see to the seaworthiness of the ship." The other two members of the court expressed a substantially similar view.

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[66] [1927] 2 K.B. 456.

We were referred to a number of American decisions of the same period, to show that the approach to the problem of construing the Harter Act was the same on both sides of the Atlantic. Thus, in *The Irrawaddy*[69] it was said that the purpose of the Act was to relieve the shipowner from liability for latent defects not discoverable by diligence on the part of anyone. In *The Mary L. Peters*[70] it was said that what was required under the Act was due diligence on the part of the owner or of those who represented him in the inspection and repair of the ship before sailing. In *The Colima*[71] it was held that the Act required due diligence not only by the owner but also by such agents as he might employ, i.e., due diligence in the work itself. A similar view was expressed in *Nordeutsche Lloyd* v. *President Insurance Co. of America.*[72]

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[67] [1895] 2 Q.B. 408.

[68] Ibid. 413.

[69] (1897) 171 U.S. 187; 64 Davies 192.

[70] 68 Fed. 919.

[71] 82 Fed. 665.

[72] 110 Fed. 420.

Reliance was also placed upon the views expressed by the editors of the 12th and 13th editions of Scrutton on Charterparties and Bills of Lading, which were the first two editions to be published after the passing of the Carriage of Goods by Sea Act, 1924, as showing the initial impact of the relevant provisions of the Hague Rules upon the legal opinion in this country. At pp. 106–107 of the 12th edition it is said: "Neither of these "Clauses" (i.e., article III, rule 1, and article IV, rule 1) "nor the provision in the Act" (whereby the absolute undertaking of seaworthiness was abolished) "will generally be of "much practical value in face of the dilemma that must constantly arise on the facts. In most cases if the vessel is "unseaworthy due diligence cannot have been used by the owner, "his servants or agents; if due diligence has been used the vessel "in fact will be seaworthy. The circumstances in which the "dilemma does not arise (e.g., a defect causing unseaworthiness "but of so latent a nature that due diligence could not have "discovered it) are not likely to occur often." Again at p. 499 of the 12th edition, note (*z*) is in the following terms: "In "appearance the undertaking to use due diligence to make the "ship seaworthy is less onerous than the old common law undertaking that the ship is in fact seaworthy. In reality there is no "great gain to the shipowner by the substitution. For the "dilemma indicated on p. 106 must constantly arise, and the "relief to the shipowner by the substitution will occur only in "cases where the unseaworthiness is due to some cause which "the due diligence of all his servants and agents could not discover, e.g., in the case of 'latent defects not discoverable by "'due diligence.'"

The first case to arise for decision in this country, in which the construction of the relevant rules was considered, was that of *W. Angliss & Co. (Australia) Pty.* v. *P. & O. Steam Navigation Co.*,[73] already referred to. The actual decision in that case was that the owners of a new ship specially built for them were not guilty of want of due diligence where the unseaworthiness complained of was caused or contributed to by certain bad workmanship in the construction of the ship on the part of some of the shipbuilders' workmen. What is relied on, however, is Wright J.'s approach to the problem which he had to consider. He said[74]: "The obligation of the carrier to exercise due diligence to make "the ship fit is clearly not limited to his personal diligence. The

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[73] [1927] 2 K.B. 456.

[74] Ibid. 460.

"carrier may be a company and, in any case in the complication "of modern affairs and by reason of the widely scattered situation "of seaports, he must act by agents or servants which is the "phrase employed in article IV, rule 2 (*q*). The question is: "How wide is the category of agents or servants with reference "to the obligation now being considered."

Since that date there have been several dicta to the same effect by Lord Wright, notably in *Paterson Steamships Ltd.* v. *Canadian Co-operative Wheat Producers Ltd.*,[75] *Northumbrian Shipping Co. Ltd.* v. *E. Timm & Son Ltd.*[76] and *Smith, Hogg & Co. Ltd.* v. *Black Sea and Baltic General Insurance Co. Ltd.*,[77] in addition to the dictum, already quoted, in *Wilsons & Clyde Coal Co.* v. *English.*[78] These dicta have already been referred to, and I do not therefore pause to quote them again.

We were next referred to a dictum of Lord Roche in delivering the judgment of the Privy Council in *Paterson Steamships Ltd.* v. *Robin Hood Mills Ltd.*,[79] a case under the Canadian Water Carriage of Goods Act, 1910, where the relevant negligence was that of a compass adjuster. The Canadian court had found that, having regard to the negligence of the compass adjuster, the shipowners were unable to establish that they had exercised due diligence to make the ship seaworthy, and there was no appeal on this issue, the appeal to the Privy Council being concerned only with a claim by the shipowners to limit their liability. What was said in the Privy Council was therefore clearly obiter, but coming from so authoritative a source it must necessarily be treated with a considerable measure of respect. Lord Roche is reported as saying[80]: "The condition is not fulfilled merely "because the shipowner is personally diligent. The condition "requires that diligence shall in fact have been exercised by the "shipowner or by those whom he employs for the purpose—see "*Dobell* v. *S.S. Rossmore Co.*[81] Therefore . . . want of dili- "gence in the compass adjuster who adjusted the compasses or "in the captain who said he checked or verified the adjuster's "work would be material, and a finding adverse to the ship- "owner could be arrived at upon the ground of want of diligence "in those persons." The importance of this dictum, which was cited with approval by the Privy Council in the very recent case of *Maxine Footwear Co. Ltd.* v. *Canadian Government Merchant*

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[75] [1934] A.C. 547.
[76] [1939] A.C. 403.
[77] [1940] A.C. 1001.
[78] [1938] A.C. 80.
[79] 58 Ll.L.Rep. 33.
[80] Ibid. 40.
[81] [1895] 2 Q.B. 408.

Marine Ltd.,[82] lies in the fact that a compass adjuster would not ordinarily be a servant in the regular employment of the shipowner, but could fairly be regarded as belonging to the category of independent contractor.

Reference was also made to some words used by McNair J. himself in *International Packers Ltd.* v. *Ocean Steamship Co. Ltd.*,[83] where he is reported as saying, with reference to the shipowner's obligation to exercise due diligence to make the ship seaworthy, that he "cannot escape on proof that he had "employed a competent independent contractor who was in fact "negligent." The judge himself referred to this dictum [84] in the course of his judgment in the present case, and said that the words imputed to him were either a slip or a mistake in reporting. Counsel for the cargo-owners contended, however, that the statement by McNair J., as reported, falls exactly into line with the previous current of authority, and sought to rely on it as supporting his argument.

Finally, reliance was placed on a decision of Devlin J. in *Waddle* v. *Wallsend Shipping Co. Ltd.*[85] In that case the claim was for loss of life resulting from the total loss of the defendant shipowners' vessel, and the construction of the Hague Rules was not immediately in issue. It was, however, necessary to consider the cognate question whether the shipowners had exercised proper care to see that their ship was seaworthy, and in relation to that question Devlin J. said [86]: "It is a universal principle (and not "special doctrine imported into this type of case) that if a "man owes a duty to another person to act carefully, he cannot "rid himself of liability by appointing somebody else, however "competent, to do it for him. A person so appointed becomes "his agent pro hac vice in the discharge of the duty; and the "principle respondeat superior applies to him just as much as it "applies to a whole time servant of the employer."

In the light of these decisions and dicta it was argued that there has been a consistent stream of authority over the years in support of the principle contended for, namely, that a shipowner cannot evade his responsibility for the exercise of due diligence to make the ship seaworthy by delegating the performance of his obligation to someone else, whether to a servant, to an agent, or to an independent contractor such as a ship repairer. Accordingly, the decision of the learned judge in the present case, whereby the shipowners were held free from liability for the bad workmanship of the repairers' fitter, amounts, so it was contended, to a novel and wholly unjustifiable departure from a well-worn principle, such as this court should be slow to approve, especially having regard to the observations made by Lord Dunedin and Lord Atkin in *Louis Dreyfus & Co.* v. *Tempus Shipping Co.*[87] Oddly enough, the observations of their Lordships in that case were strenuously pressed upon us by both sides. For the shipowners on their side have contended that the decision of Wright J. in *Angliss'* case, properly understood, is a decision wholly in their favour, and one that should not now be disturbed after it has stood unchallenged for over thirty years.

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[82] [1959] A.C. 589, 602.
[83] [1955] 2 Lloyd's Rep. 218, 236.
[84] [1959] 1 Q.B. 86, 93.
[85] [1952] 2 Lloyd's Rep. 105.
[86] Ibid. 129.

I hope that I have adequately summarised the argument so forcibly presented to us on behalf of the cargo-owners. I certainly appreciate its force, and it is only after careful consideration that I have come to the conclusion that it is not well founded. But I am persuaded that in coming to the conclusion which he did McNair J. was guilty of no error of principle, and that on the particular facts of this case he came to a correct decision in absolving the shipowners from liability for the bad workmanship of the repairers' fitter.

I base my conclusion both on principle and on authority. In the first place, as a matter of construction, and unhampered by authority, I find it impossible to extract the principle contended for by the cargo-owners from the words of the Act, and of the rules scheduled thereto, without doing violence to the language used. It is not to be forgotten that by the Australian Act, as by our own Act, the old absolute undertaking of seaworthiness has been abolished. Yet, as pointed out by McNair J., acceptance of the construction sought by the cargo-owners to be put on article III, rule 1, would be in effect to substitute for the new qualified obligation something barely distinguishable from the old absolute undertaking, except in the necessarily rare cases of true latent defect. The obligation now imposed is to exercise due diligence, not to see that due diligence has been exercised—still less is there any warranty that due diligence has been exercised. An obligation to exercise due diligence is to my mind indistinguishable from an obligation to exercise reasonable care—a concept not unfamiliar in English law, and one to be sharply distinguished from the obligation, to which certain relationships give rise, to see that care is taken. Moreover, as appears from the wording of article

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[87] [1931] A.C. 726, 733, 749; 47 T.L.R. 542.

IV, rule 1, it is due diligence "on the part of the carrier" that is in question under the Hague Rules. These words are no doubt wide enough to render the carrier liable for lack of due diligence on the part of his own servants, whatever the task on which they may be engaged. Again, where an independent contractor is engaged by a carrier to perform on his behalf any part of the ordinary business of carrying goods, e.g., a firm of stevedores employed to load cargo, I can well understand that failure on the part of such contractor to exercise due diligence could be held to be a failure on the part of the carrier. Similarly, where a shipowner appoints some independent person to act for him, i.e., to be his representative, such as a firm of ship's agents, or a surveyor or engineer appointed to supervise the building or repair of a ship, he may become liable for any want of due diligence on the part of such person, as being equivalent to his own want of due diligence. Such persons could properly be regarded in law as his servants pro hac vice, though not persons in his regular employment. But that is far removed from saying that every time a shipowner engages some outside person or independent contractor to perform some work on a ship which goes outside the carrier's own business of carrying goods, he renders himself liable for any lack of due diligence on the part of such person or contractor. Where the matter in question is one of building, or rebuilding, or repairing a ship, or of the supply of equipment or spare parts, I can see no reason in principle why the court cannot properly be invited to conclude, as a jury question, that the carrier has exercised due diligence, upon proof (a) that he has engaged a reputable contractor or supplier, (b) that he has provided for the work to be properly superintended by his own representative, and (c) that such representative has in fact exercised due diligence. To hold the contrary would, as it seems to me, lead to absurd results which cannot have been in the contemplation of those who framed the rules. The carrier, even though he may only be a purchaser at second hand, would have to be held liable for any defective workmanship in the original building of the ship, or in any repairs carried out at any time in the ship's history, and equally for any defective equipment or spare parts supplied at any time in the ship's history, notwithstanding that the defects might be latent to everybody but the original builder, repairer or supplier, and notwithstanding that such person might be far removed from the carrier by a chain of contractors and sub-contractors. It would, in my judgment, be absurd to construe the rules in such way as to render it thus virtually impossible for a shipowner ever to discharge his obligation.

In my judgment the fallacy in the argument on behalf of the cargo-owners lies in the use of the word "delegation" to cover every occasion when the shipowner engages some other person to do some work upon his ship. I see a distinction between employing someone else to carry on one's own business and engaging someone else to perform something which is his business. Any master delegates to his own servants the work of carrying on his own business. Equally I think he may be said to delegate when he employs some outside person to act as his representative. In applying articles III, rule 1, and IV, rule 1, of the Hague Rules the difficult question which has to be determined is whether, on the facts of the particular case, the person who has failed to exercise due diligence is one who can fairly be said to be the carrier's representative. The superintendent or surveyor whom the carrier employs to supervise the repair of a ship may fairly be said to be the carrier's own representative, to whom he has delegated the performance of his own obligation to exercise due diligence to make the ship seaworthy. But I find it difficult to see how in principle a carrier can be said to be delegating to the firm of repairers whom he employs his own obligation to exercise due diligence. In so far as he can be said to delegate to the repairers at all, he delegates performance of the actual job of doing the repairs and making the ship seaworthy.

If the matter were res integra, therefore, and uncomplicated by authority, I should find it impossible to accede to the argument on behalf of the cargo-owners, or to hold, as a matter of construction of the rules, that whenever some contractor's workman puts in bad workmanship in carrying out work on the ship, that is necessarily conclusive to show a want of due diligence on the part of the shipowner. Do the authorities compel me to hold otherwise? In my judgment they do not; on the contrary, they appear to me to lead to the same result.

Any examination of the authorities must, as it seems to me, begin with *Angliss'* case,[88] which properly understood is in my view wholly in favour of the shipowners' case. I have already stated what was the actual decision in that case. If that decision be right, I am unable to see any distinction in principle between bad workmanship on the part of the original builders' men and bad workmanship on the part of repairers' men at a later period in the ship's history.

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[88] [1927] 2 K.B. 456.

As I read the report of *Angliss'* case, the same argument as has been adduced before us was put forward before Wright J. and decided by him adversely to the cargo-owners. Immediately following the passage in his judgment which I have already quoted, Wright J. went on as follows[89]: "It is contended by the "plaintiffs that, as the primary obligation on the carrier is to "provide a seaworthy ship, the carrier cannot delegate any part "of that obligation so as to relieve him of his personal liability, "and he must accordingly be accountable for lack of due "diligence on the part of the shipbuilders and their workmen, "who are to be deemed to be his agents, to make the ship seaworthy and fit, and that, therefore, the defendants must be "held liable for the bad workmanship of which I have found the "shipbuilders' men guilty and which I have not excluded as a "contributing cause of the actual damage. I do not think that "this contention is sound." The contention which Wright J. is there declaring to be unsound is the contention that the carrier cannot delegate any part of his obligation so as to relieve him of his personal liability.

I think it is clear that had the question of faulty workmanship on the part of repairers' men been before Wright J. in *Angliss'* case, his conclusion would have been the same as it was in relation to faulty workmanship on the part of the builders' men. I can see no other possible interpretation of the sentence already quoted by my Lord where the judge says[90]: "Again the need of "repairing a ship may cast on the carrier a special duty to see, "as far as reasonably possible, by special advisers for whom he "is personally responsible, that the repairs adequately make good "the defects." On the cargo-owners' argument there could be no point in referring to the carrier's duty to appoint "special "advisers" or to his personal liability for any errors on their part. For such a "special adviser," whether negligent or diligent, would be quite irrelevant if the carrier is in any event to be held liable for bad workmanship on the part of the repairers' men. According to Wright J., the carrier may be in breach of his obligation if he does not appoint a "special adviser." Yet, on the cargo-owners' argument, even if he does, and even if such "special adviser" is in every way diligent, the carrier has still not fulfilled his obligation where there is in fact bad workmanship. Clearly Wright J.'s view was that the carrier would be liable (a) if he failed to appoint a special adviser to supervise the repairs, or (b) if such special adviser failed to exercise due diligence, but would not be liable if such special adviser, exercising due diligence, failed to detect, e.g., bad workmanship on the part of the repairers' men. This, I think, is in accordance with his statement[91] that the carrier "is "to be liable for all such duties as appertain to a prudent and "careful carrier acting as such by the servants and agents in his "employment."

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[89] [1927] 2 K.B. 456, 460.

[90] Ibid. 462.

The decision in *Angliss'* case has never been overruled, nor, so far as I am aware, has it been the subject of any adverse comment. It was followed and applied by Bucknill J. in *The Australia Star*,[92] where the facts were somewhat similar. It was referred to with obvious approval by Singleton J. in *Smith & Sons* v. *P. & O.*,[93] though in the event nothing turned on it, since on the facts the repairers in that case were found to be free from fault. It was again referred to and treated as authoritative by Devlin J. in *Waddle* v. *Wallsend Shipping Co. Ltd.*,[94] though once again the actual decision of that case turned on another point. In the American case of *The Waterville Victory*,[95] where the facts appear from the report to have been substantially the same as those in *Angliss'* case, the same result was reached, and the shipowner was held not to have failed in his duty to exercise due diligence notwithstanding defective workmanship on the part of the builders' men.

But what is perhaps most important is that the decision of Wright J. in *Angliss'* case was carefully considered by the House of Lords in the recent case of *Davie* v. *New Merton Board Mills Ltd.*,[96] where it was treated with obvious approval. In that case the question was whether an employer was liable for injury caused to one of his workmen by the defective condition of a tool supplied for the use of the latter. The tool had been purchased by the employer from a reputable supplier, who had in turn obtained it from a reputable manufacturer. The defect in the tool was such that it could not have been detected by anyone but the original manufacturer. In these circumstances the House of Lords unanimously decided that the employer was not liable for the injury sustained by the workman. The argument on behalf of the workman was based largely on the speech of Lord Wright in *Wilsons & Clyde Coal Co.* v. *English*,[97] and reliance was placed particularly on the dictum therein which I have already quoted, and in which Lord Wright sought an analogy in the liability of a carrier under the Carriage of Goods by Sea Act, 1924. In dealing with this argument in *Davie's* case Viscount Simonds said,[98] " . . . the analogy is an unfortunate one, for in the earlier case of " *W. Angliss & Co. (Australia) Pty.* v. *P. & O. Steam Navigation* " *Co.* the same learned judge had to construe the same section, " and I venture to quote a substantial passage of his judgment " because it is very apposite to the present case." Viscount Simonds then proceeded to set out the passage in Wright J.'s judgment in *Angliss'* case [99] which I have already quoted, and continued: " My Lords, I think, with great respect, that when in " *Wilsons'* case the learned judge referred to the analogy of the " Carriage of Goods by Sea Act, 1924, he did so with an imperfect " recollection of what he had himself decided in the earlier case." Clearly Viscount Simonds thought that the decision in *Angliss'* case was right, and that in so far as the dictum in *Wilsons'* case differed from what Lord Wright had said in the earlier case it went too far. Lord Morton of Henryton did not specifically refer to *Angliss'* case, but he expressed his agreement with Viscount Simonds' examination of the cases cited in argument. Lord Reid thought that what Lord Wright said in *Wilsons'* case could be reconciled with his previous decision in *Angliss'* case, but on the footing that what was said in *Wilsons'* case related only to cases where performance of the shipowners' obligation was delegated to a skilled servant. In *Davie's* case Lord Reid said [100]: " In " choosing this analogy [the Carriage of Goods by Sea Act, 1924] " I think that [Lord Wright] must have had in mind his own " carefully reasoned judgment in *W. Angliss & Co. (Australia)* " *Pty.* v. *P. & O. Steam Navigation Co.* and, reading the " words ' personal obligation ' and ' absolutely ' in the peculiar " sense which he gives to them in his speech in *Wilsons and* " *Clyde*, I see no contradiction between this passage and that " judgment." Later, Lord Reid said [101]: " Lord Wright had the " nature of the vicarious liability of a shipowner sufficiently in " mind to enable him to select this as an appropriate analogy to " the vicarious liability of an employer to his servant, and it

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[91] [1927] 2 K.B. 456, 461.

[92] (1940) 67 Ll.L.Rep. 110, 116.

[93] (1938) 60 Ll.L.Rep. 423.

[94] [1952] 2 Lloyd's Rep. 105.

[95] (1957) Amer.Marine Cas. 320.

[96] [1959] A.C. 604.

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[97] [1938] A.C. 57.
[98] [1959] A.C. 623.
[99] [1927] 2 K.B. 460.
[100] [1959] A.C. 632.
[101] Ibid. 634.

"seems to me impossible that he could at the same time have "forgotten his judgment in *Angliss*, and equally impossible that "he would have said no more than he did in *Wilsons and Clyde* "if he had come to think that his judgment in *Angliss* was "wrong." Lord Tucker was content to express his agreement with Viscount Simonds and Lord Reid in their analyses of what was said in *Wilsons and Clyde* and their conclusions thereon. Lord Keith, who also agreed, referred specifically to *Angliss'* case and quoted a long passage from the judgment of Wright J. in support of his own conclusion.

In these circumstances I think it must now be taken that the decision in *Angliss'* case has the approval of the House of Lords, and therefore should be followed by this court. If so, for reasons already given, I can see no ground in principle for distinguishing it from the present case. It is difficult to see why it is not decisive in favour of the shipowners here. The authorities cited in support of the argument for the cargo-owners, on the other hand, appear to me to be far from decisive. Many of the cases referred to turn out on examination to be cases where the lack of due diligence was that of one of the shipowners' own servants, and the dicta relied upon were clearly obiter. They cannot weigh in the balance against the actual decision in *Angliss'* case, which, as already stated, appears to me to be indistinguishable in principle from the present case.

But that is not the end of the matter, for in the course of the argument before us a large number of cases were cited in which consideration was given to the responsibility of a person, upon whom the law imposed a duty to exercise reasonable care, for damage resulting from the negligence of an independent contractor employed by him. I do not find it necessary to burden this judgment by any prolonged examination of these authorities. They were referred to by way of analogy only, but so far as they go they weigh heavily in favour of the argument for the shipowners. So long as we remember that we are proceeding only by way of analogy I think it is useful to examine briefly the principles on which the court has acted in cases where it has been sought to fix liability upon a person under a duty to exercise reasonable care for the faults of an independent contractor. As already stated, I can see no distinction in principle between an obligation to exercise due diligence, such as article III, rule 1, of the Hague Rules imposes on a carrier, and an obligation to exercise reasonable care, such as the law imposes, for instance,

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upon a bailee in favour of the bailor, upon a master in favour of his servant, or upon an invitor in favour of an invitee. Cases arising out of all these relationships were cited to us, and basing himself upon these cases, counsel for the shipowners formulated his proposition as follows. Where the law imposes an obligation to exercise reasonable care, as opposed to an obligation to see that care is taken, it is always a question of fact whether such reasonable care has been exercised. In considering this question the court will pay regard to whether what has to be done is something which normally forms part of the obligor's own ordinary trade or business. If it does, then, if what has to be done is negligently done, the obligor is liable, whether he has done it himself or by his servants or by engaging an independent contractor to do it for him. If, however, what has to be done is no part of the obligor's ordinary trade or business, but is something calling for the exercise of specialised knowledge or experience, then the obligor discharges his duty by engaging a properly skilled person to do it for him, and is not liable if that person does it negligently, assuming of course that such negligence is not apparent to the obligor himself.

It seems to me that this proposition is well justified by the authorities which were cited to us. Thus, in *Searle* v. *Laverick*,[102] the bailee of a carriage, who owed a duty to exercise reasonable care to see that the building in which the carriage was housed was safe, was held not liable for damage resulting from the collapse of the building due to the negligence of a competent independent contractor whom he had engaged to erect it for him. Similarly in *Haseldine* v. *Daw*,[103] the occupiers of a building were held not liable to an invitee for personal injuries sustained in consequence of the defective condition of a lift, which they had engaged a competent independent contractor to keep in repair for them. This case may usefully be contrasted with *Woodward* v. *Mayor of Hastings*,[104] where the negligence of the independent contractor occurred in the course of doing something which did not call for the exercise of any special skill, and the decision went the other way. Again, in *Phillips* v. *Britannia Hygienic Laundry* [105]—a case which went to the Court of Appeal on another point—and in *Stennett* v. *Hancock*,[106] the owner of a vehicle was held not liable to another road user for damage occasioned by a defect in the vehicle, the repair of which he had entrusted to an independent contractor.

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[102] (1874) L.R. 9 Q.B. 122.

[103] [1941] 2 K.B. 343.

[104] [1945] K.B. 174.

[105] [1923] 1 K.B. 539.

[106] [1939] 2 All E.R. 578.

The principle for which counsel for the shipowners contended was neatly and, I think, correctly summed up by Salmon J. in the recent case of *Green* v. *Fibreglass Ltd.*[107] where most of the relevant authorities are collected. It also formed the basis for Lord Reid's decision in *Davie's* case, as appears from the final paragraph of his speech.[108] *Davie's* case itself is of considerable importance, not only for its approval of the decision in *Angliss'* case, but also as showing that, in regard to the master and servant relationship, there is a limit beyond which the law will not go in imposing liability on an employer for the negligence of a so-called independent contractor. It is to my mind clear from the reasoning underlying the speeches of the various members of the House that, if *Davie's* case had fallen to be determined in accordance with the duty imposed upon the carrier under the Hague Rules, instead of that imposed by the law of master and servant, the result would have been the same.

It seems to me that the principle underlying the decision of these cases from other branches of the law must be a guide in approaching the question—essentially a question of fact—whether in a given case a carrier under the Hague Rules has discharged the burden, which lies upon him, of proving that he has exercised due diligence to make the ship seaworthy. Clearly the carrier must act through servants and agents and for any failure on their part to exercise due diligence he must accept responsibility. Due diligence may require him to appoint some outside person, that is, an expert adviser or a surveyor, to act as his representative and advise him in connection with some technical matter. Here again I apprehend that this would be a true case of delegation of his own obligation to exercise due diligence, and he would remain responsible for any lack of due diligence on the part of such person. There may well be cases in which the employment of an independent contractor can be regarded as a delegation of the carrier's duty to exercise reasonable care, e.g., where the task to be performed is something falling within the carrier's own ordinary business as a carrier. As already suggested, the employment of a firm of stevedores to perform the work of loading or discharging the ship is an instance which comes to mind. But I do not think it follows that every time an independent contractor is employed the carrier must be regarded as delegating to such contractor his own duty to exercise due diligence to make the ship seaworthy. Where the work to be done is of a specialised nature, outside the course of the carrier's ordinary business, it seems to me quite unreal to say that the carrier is delegating his duty to exercise due diligence; on the contrary, the very fact of employing a skilled and competent contractor may amount of itself to a performance of the duty. The question must be one of fact, depending on the nature of the work to be performed.

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[107] [1958] 2 Q.B. 245, 250; [1958] 3 W.L.R. 71; [1958] 2 All E.R. 521.

[108] [1959] A.C. 645.

In the present case it could be said that the work of replacing the inspection covers after examination of the storm valves was a task well within the competence of one of the engineer members of the ship's crew, and as such something within the ordinary course of the carrier's business, rather than a matter calling for the exercise of any specialised technical skill. It is fair to say that the appeal was not argued on this ground, and upon consideration I do not think it would be a valid argument on the facts of this case. The work of replacing the inspection covers was merely incidental to the work of opening up the storm valves for inspection, which, being part of the survey through which the ship was being passed, was a task properly entrusted to the competent contractors whom the shipowners engaged. In the same way the task of replacing the wheel of a car is one that is doubtless within the competence of the ordinary car owner. Yet no one, I venture to think, would suggest that it was a task not properly to be left to a competent garage to whom the owner may have entrusted the car for the purposes of a repair necessitating the removal of a wheel. In my judgment this case must be approached on the basis that the replacement of the inspection covers of the storm valves was part of the specialised and technical work which Messrs. Alexander Stephen were properly engaged to do.

The employment of competent contractors to carry out the work that has to be done is in my judgment merely one step in the exercise of due diligence. All the circumstances in relation to the particular repair must be looked at. It seems to me that the right approach to the problem is that made by Hilbery J. in *Cranfield Bros. Ltd.* v. *Tatem Steam Navigation Co. Ltd.*,[109] a case arising under the Canadian Water Carriage of Goods Act, 1936, where the damage was caused by a defective rivet which had escaped detection. Hilbery J. said: "The shipowner does

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[109] (1939) 64 Ll.L.Rep. 264, 267.

"not discharge his duty of exercising due diligence to have his "ship seaworthy merely by establishing to the court that she "passed her classification survey, or merely by showing to the "court that he has appointed someone who by qualification should "be a skilled person to examine it; but both those things are "elements to be considered, in my view, in considering whether "the shipowner has exercised due diligence to make the ship "seaworthy. . . . Again, of course, it is an element to be "considered whether there has been a sufficiently frequent dry-"docking of the vessel for examination and report. That is "another element to be considered; and it is an element to be "considered to see into whose hands the owners have put the "vessel for their periodical examinations and reparations—to see "whether they are properly skilled people for the work."

In the present case the shipowners, in my judgment, exercised due diligence in arranging for the classification and loadline surveys to be carried out. Having regard to the technical nature of the work to be done I think they also exercised due diligence by entrusting the vessel to a competent firm of repairers. On the facts of this case I regard this as an act in furtherance of their obligation, not as a delegation of their obligation, to exercise due diligence. Furthermore, they arranged for their own managers' superintendent, Mr. Atkinson, to supervise the work and see that the requirements of the classification surveyors were carried out. This again I regard as an act in furtherance of their obligation to exercise due diligence. Had they not appointed some competent person to superintend the work, they would, I think, have been guilty of a want of due diligence. But in the case of Mr. Atkinson I have no doubt that they did, properly and wisely, delegate to him the duty of acting for them throughout, which would involve the continuing exercise by him of due diligence on their behalf. Had Mr. Atkinson shown a want of due diligence—had he, for instance, failed to detect bad workmanship which ought to have been detected—the shipowners would have been liable for his want of due diligence as for their own, and in such case it would have been no answer to say that the contractor employed to carry out the repairs was a competent one. Nor would it help the shipowners, I think, to say that the classification surveyor also failed to detect the bad workmanship. But here, on the facts found by the learned judge, there was no fault on the part of Mr. Atkinson. The fault was entirely that of the fitter employed by the repairers, and it was a fault which, as

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found by the learned judge, could not reasonably have been detected by following the ordinary and prudent practice. In these circumstances, on the facts of this case, it appears to me that it would be contrary to common sense, and would be doing violence to the plain meaning of the words of article III, rule 1, of the Hague Rules, as well as flying in the face of authority, to say that these shipowners were guilty of a want of due diligence to make their ship seaworthy.

For these reasons I am of the opinion that the learned judge came to a correct conclusion, and I would dismiss the appeal.

I should, however, like to add one word of caution. It is a commonplace that there is nothing static about what does, and what does not, amount to negligence. Reasonable care—and equally, due diligence—requires that men must learn from their mistakes. It may be that in future, in the light of experience gained in this case, it will not be regarded as good practice to leave a repairers' fitter unsupervised when he is performing tasks such as that of replacing these inspection covers. It does not follow necessarily from our decision in this case that, if a similar casualty happens in the future, arising from a similar cause, the shipowners concerned, having regard to the experience now gained, will be able to show that they have exercised due diligence without proof of something more than has been proved in this case.

Appeal dismissed with costs.
Leave to appeal to the House of Lords.

Solicitors: *Clyde & Co.; Botterell & Roche.*

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Morris, Willmer and Harman L.JJ.

CROWE (VALUATION OFFICER) *v.* LLOYDS BRITISH TESTING CO. LTD.

[LVC/793/1958.]

Rates and Rating—Industrial hereditament—"Non-industrial building"—Hereditament for testing cables held in 1931 to be a factory but not an "industrial hereditament"—Whether "non-industrial building" not "used wholly or mainly for industrial purposes"—Meaning of "industrial purposes"—Rating and Valuation Act,

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1925 (15 & 16 *Geo.* 5, *c.* 90), *s.* 22 (1) (*a*) *and* (*b*), (4)—*Rating and Valuation* (*Apportionment*) *Act*, 1928 (18 & 19 *Geo.* 5, *c.* 44), *ss.* 3, 4—*Rating and Valuation* (*Miscellaneous Provisions*) *Act*, 1955 (4 *Eliz.* 2, *c.* 9), *s.* 5 (3).

Statute—Construction—Subsequent enactments—Earlier and later Acts to be construed "as one"—Rating and Valuation Act, 1925, *s.* 22 (1) (4)—*Rating and Valuation* (*Apportionment*) *Act*, 1928, *ss.* 3, 4.

Section 68 of the Local Government Act, 1929, granted rating relief to "industrial hereditaments" as defined in the Rating and Valuation (Apportionment) Act, 1928,[1] namely, those occupied and used, inter alia, "as a factory or workshop," those words having, for the purposes of the Act, the same meaning as in the Factory and Workshop Acts, 1901 to 1920. By section 10 (2) the Act of 1928 was to be construed "as one" with the Rating and Valuation Act, 1925.[2]

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[1] Rating and Valuation (Apportionment) Act, 1928, s. 3: "(1) In "this Act the expression 'industrial "'hereditament' means a hereditament (not being a freight-transport "hereditament) occupied and used as "a mine or mineral railway or, subject as hereinafter provided, as a "factory or workshop: Provided that "the expression 'industrial hereditament' does not include a hereditament occupied and used as a "factory or workshop if it is primarily "occupied and used for the following "purposes or for any combination of "such purposes, that is to say— . . . "(*f*) any other purposes, whether or "not similar to any of the foregoing, "which are not those of a factory or "workshop. (2) For the purposes of "this Act any place used by the "occupier for the housing or maintenance of his road vehicles or as "stables shall, notwithstanding that "it is situate within the close, curtilage or precincts forming a factory "or workshop and used in connection "therewith, be deemed not to form "part of the factory or workshop, but "save as aforesaid, the expressions "'factory' and 'workshop' have "respectively the same meanings as "in the Factory and Workshop Acts, "1901 to 1920."

S. 4: "(1) In every valuation list "every industrial hereditament occupied and used wholly for industrial "purposes shall be shown as being "so occupied and used, and as "respects every such hereditament "occupied and used partly for industrial purposes, the net annual "value thereof shall be shown, in the "prescribed manner, as being apportioned between the occupation and "user of the hereditament for industrial purposes, and the occupation "and user thereof for other purposes. "(2) For the purpose of determining "in what proportions an industrial "hereditament is occupied and used "for industrial purposes and for other "purposes respectively, the following "provisions shall have effect:— "(*a*) The hereditament shall be "deemed to be occupied and used for "industrial purposes except in so far "as any part thereof is, under this "Act or under the enactments relating to the regulation of mines, "factories and workshops, to be "deemed neither to be, nor to form "part of, a mine, factory, or workshop: . . ."

S. 10: "(2) This Act . . . shall be "construed as one with the principal "Act. . . ."

[2] Rating and Valuation Act, 1925, s. 22: "(1) For the purposes of the "first new valuation list to be prepared under this Act and of any "subsequent valuation list the rateable value of a hereditament shall "be ascertained as follows:—(*a*) If "the hereditament belongs to one of "the classes specified in the first "column of the table contained in "Part I of the Second Schedule to this

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A company sought relief under the Act of 1928 in respect of premises occupied and used by them for the testing and finishing of chain cables and anchors under a licence, pursuant to the Anchors and Chain Cables Act, 1899. In 1931 the House of Lords decided that the testing establishment, although a factory, was not an "industrial hereditament" within the relief of the Act of 1928, because it was primarily used for the purposes of testing operations, and as such operations were not factory purposes, the hereditament fell within the exception from rating relief under section 3 (1) (*f*) of the Act of 1928.

The Rating and Valuation Act, 1957, gave certain rating relief to hereditaments which fell to be assessed under paragraph (*a*) of section 22 (1) of the Act of 1925 (as amended by section 5 of the Rating and Valuation (Miscellaneous Provisions) Act, 1955).[3]

"Act, there shall be deducted from the gross value of the hereditament an amount representing the deduction specified with respect to hereditaments of that class in the second column of the said table, . . . and the gross value as so reduced is in this Act referred to as the net annual value: (*b*) If the hereditament is not such a hereditament as is mentioned in paragraph (*a*), there shall be estimated the rent at which the hereditament might reasonably be expected to let from year to year if the tenant undertook to pay all usual tenant's rates and taxes and tithe rentcharge, if any, and to bear the cost of the repairs and insurance and the other expenses, if any, necessary to maintain the hereditament in a state to command that rent, and the annual rent as so estimated shall, for the purposes of this Part of this Act, be taken to be the net annual value of the hereditament: . . . "

Sch. 2, Part I, Note: "For the purposes of this Part of this Schedule the expression 'houses and buildings' does not include mills, manufactories or premises of a similar character used wholly or mainly for industrial purposes or hereditaments valued as part of any railway, dock, canal, gas, water, electricity, or other public utility undertaking."

[3] Rating and Valuation (Miscellaneous Provisions) Act, 1955, s. 5: "(1) Section 22 of the Act of 1925 (which specifies the way in which the rateable values of hereditaments outside London are to be ascertained) shall have effect subject to, and as extended by, the following provisions of this section. (2) In paragraph (*a*) of subsection (1) of that section (which provides for ascertaining the net annual value by making certain deductions from the gross value), for the words from the beginning of the paragraph to the words 'second column of the said table' there shall be substituted the followings words:—'If the hereditament consists of one or more houses or other non-industrial buildings, with or without any garden, yard, court, forecourt, outhouse or other appurtenance belonging thereto, but without other land, there shall be deducted from the gross value of the hereditament an amount representing the deduction specified, in relation to that gross value, in the second column of the table contained in Part I of the Second Schedule to this Act.' (3) At the end of the said section 22 there shall be added the following subsection:—'(4) In this section the expression "house" includes part of a house, the expression "non-industrial building" means a building, or part of a building, of any description, with the exception of factories, mills and other premises of a similar character used wholly or mainly for industrial purposes, and of premises valued as part of—(*a*) a railway, dock,

Held (Morris L.J. dissenting), that the testing establishment should be valued under paragraph (*a*) of section 22 (1), for it was not a factory "used wholly or mainly for industrial purposes," and was, therefore, a "non-industrial building" within the definition in section 22 (4). Where, as here, the earlier and later Acts were concerned with the same subject-matter and were to be construed "as one," then, prima facie, an industrial hereditament in the Act of 1928 and an industrial building in the Act of 1925 (as amended by the Act of 1955) ought to receive the same interpretation; and so to construe them avoided the absurdity that a hereditament held in 1931 not to be an "industrial hereditament" was at one and the same time not a "non-industrial building" (post, pp. 621, 623).

The combined effect of sections 3 and 4 of the Act of 1928, moreover, required "industrial purposes" to be equated with "factory purposes," and the same meaning should be given to "industrial purposes" in the subsequently enacted section 22 (4). The House of Lords having decided that the work of testing cables was not a factory purpose, it followed that it was not an industrial purpose (post, pp. 620–621, 623).

Per Willmer and Harman L.JJ. The words "used wholly "or mainly for industrial purposes" in section 22 (4) must be construed as governing each of the three categories previously mentioned, namely, "factories," "mills" and "other premises of "a similar character" (post, pp. 618, 622).

Grove v. *Lloyds British Testing Co. Ltd.* [1931] A.C. 450, 466; 47 T.L.R. 308 applied.

Per Morris L.J. dissenting. In the absence of any statutory limitation or modification, the words "industrial purposes" should be construed in their ordinary meaning; and nothing in the "deeming" process laid down by section 4 (2) of the Act of 1928, which introduces the phrase "industrial purposes," forms any basis for ascribing to that phrase any meaning other than its ordinary meaning. This testing establishment is a building of a similar character to factory premises used wholly or mainly for industrial purposes, namely, the proving and testing of chain cables and anchors in accordance with the Anchors and Chain Cables Act, 1899, and does not fall to be assessed under section 22 (1) (*a*) (post, pp. 609, 616).

Decision of Lands Tribunal affirmed.

APPEAL from Lands Tribunal (Mr. Erskine Simes Q.C.) on a case stated.

"'canal, gas, water or electricity "'undertaking, or (*b*) any public "'utility undertaking not falling "'within the preceding paragraph, "'and the expression "appurten- "'"ance," in relation to a dwelling- "'house, or to a school, college or "'other educational establishment, "'shall be taken to include all land "'occupied therewith and used for "'the purposes thereof.' (4) The "table contained in the Second "Schedule to this Act shall be sub- "stituted for the table in Part I of "the Second Schedule to the Act of "1925 (including the note appended "thereto)."

The following statement is compiled from the written decision of the Lands Tribunal given on November 24, 1958, the case stated on May 26, 1959, and the statement of the facts (including a citation describing the operations of a company at the hereditament in question, taken from the report in the Court of Appeal of an earlier case concerning the same premises—*Dudley Revenue Officer* v. *Lloyds British Testing Co. Ltd.*[4])—and of the provisions of the Anchors and Chain Cables Act, 1899, in the judgment of Morris L.J. (infra).

Prior to 1928, a company, Lloyds British Testing Co. Ltd., owned and occupied a hereditament described as testing house and premises, 177, Cradley Road, Dudley, for the purpose of testing, proving, and finishing chain cables and anchors in accordance with the provisions of the Anchors and Chain Cables Act, 1899. Under that Act it is provided that a maker of or dealer in anchors or chain cables shall not sell or contract to sell, nor shall any person purchase or contract to purchase, for use on any British ship, any chain cable or any anchor exceeding in weight 168 lb., unless it has been previously proved in accordance with the Act. A contract for the sale of any such chain cable or anchor carries with it, in the absence of an express stipulation to the contrary, an implied warranty that the anchor or cable has before delivery been proved in accordance with the Act. A chain cable or anchor must be tested and proved by authorities independent of the manufacturers, of whom the Committee of Lloyd's Register of British and Foreign Shipping for testing establishments is one.

The company had a licence pursuant to the provisions of section 5 of the Act for the testing of anchors and chain cables with a view to their proof. The Act lays down the methods of testing anchors and chain cables, and prescribes the tensile strength and the breaking strain used for the purpose of testing anchors and chain cables. Provision is made for the authorising of the maximum charges which may be made by a licensed tester, who must clearly show in his testing establishment both the authorised scale of maximum charges and the charges actually made by him. An Inspector of Testing Establishments was appointed.

The operations carried on by the company were, in 1930, described as follows: "The cables were sent to the occupiers' "works in their manufactured state but unfinished in the respects

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[4] [1931] 1 K.B. 404, 405–408; 46 T.L.R. 601.

"hereinafter mentioned. In accordance with the provisions of "section 9 of the Act of 1899 a piece of three links was selected "and cut out of the length of chain cable. This cutting out was "performed by a heavy hydraulic cutter which severed two links "one on each side of the piece of three links. The sample piece "was then taken to a hydraulic machine and subjected to a test "load, called the breaking strain, determined as to load by the "provisions of the Second Schedule of the said Act. If the piece "selected failed to withstand the breaking strain, a further "sample piece was cut out in the aforesaid manner and subjected "to the same test. If neither of the samples withstood the breaking strain the whole length was rejected. If one of the sample "pieces satisfactorily withstood the breaking strain the several "parts of the cable length were joined together by a welded link "formed and welded at a forge on the premises by the occupiers' "employees. The restored cable length was then placed in its "entire length in the chain proving machine and subjected to a "reduced test load, as provided by the Act, and termed the "tensile strain, and this test resulted in appreciable elongation "of the cable and a certain change in shape in each link. The "cable was then carefully examined link by link by two separate "sets of examiners successively who in the course of examination "detected any flaws and removed all scale from the links. In the "event of any defective links being found on this examination "these were cut out and replaced by welded links formed and "joined in the manner above described, and the whole length "was then retested. When the said tests had been applied in "accordance with the Act the occupiers, as licensed testers, were "under obligation to, and did in fact, stamp with a distinctive "mark, as laid down in section 10 of the Act, each cable that had "withstood the said strains and was in the opinion of the "licensed tester without flaw or material weakness. Thereafter, "the cable length was drawn into a tank and submerged in hot "water. Whilst still hot it was then drawn through a second "tank containing an anti-corrosive tar preparation and after that "it was ready for despatch to the ultimate consignee. These "last two processes were necessary in order to make the cable "commercially saleable, and if not carried out at the occupiers' "works would have to be carried out at some other place and either "by the manufacturer, purchaser or some other person. With "regard to anchors, these were similarly received in their manufactured state from the makers but unfinished in the respects "hereinafter mentioned. The anchor was weighed to determine "the test load. It was then placed in the anchor testing machine "and submitted to the statutory proof strain required. It was "then taken to pieces for examination of the various parts, and "if satisfactory was reassembled. In some types of anchor, the "riveting of heated pins inserted by the occupiers' workmen was "necessary in the process of reassembly. When an anchor had "passed the test, the obligations and practice of the occupiers "as regards stamping was the same mutatis mutandis as in the "case of cables. Before delivery to the consignees anchors "were painted by hand. It was further the obligation under the "Act and practice of the occupiers, upon request, to deliver a "certificate in respect of any cable or anchor which had "respectively withstood the said strains and in the opinion of "the occupiers was without flaw or material weakness. The "hereditament contained heavy machinery and plant both "hydraulic and electric for the purpose of carrying out the work "above mentioned, and also of other work carried out upon the "hereditament, which consisted of testing samples of metal, "cable, wire rope and other metal substances for other manufac-"turers, such tests not being in any way connected with the Act "of 1899. In the case of such wire rope the method employed "was to test to destruction, i.e., to place strain upon the rope "until it broke, and the result of such test was communicated "to the manufacturers by means of a written statement or "formula showing the result of the test. In the hereditament "there was a machine shop installed with power and machinery "in which the manufacture and repair of tools and plant used by "the occupiers and the shaping of portions of metal for the above-"mentioned tests were carried out."

The hereditament was similarly used, as the Lands Tribunal found, at the date in 1958 of the hearing before the tribunal, save that the three links for the breaking test were then cut at the maker's premises and not on the hereditament, and the amount of "forging" of links had been considerably reduced since 1931, consequent on the uses of high tensile steel for cables which could not be forged on the hereditament. The extent of that change was indicated by the fact that in the year ending December 31, 1931, of 23,650 fathoms tested, all were of wrought iron, and approximately 1,600 links were forged, while in the year ending December 31, 1956, of 51,374 fathoms tested, 3,570 only were of wrought iron and 82 links only were forged.

In 1931 the hereditament in question was the subject of an appeal to the House of Lords (*Grove* v. *Lloyds British Testing Co.*

Ltd.[5]), and in the course of that hearing it was admitted that the forging of links brought the hereditament within the definition of " metal and india rubber works " in the Sixth Schedule to the Factory and Workshop Act, 1901. The hereditament was thereafter treated as subject to the Factory Acts. The House of Lords decided on that appeal in 1931 that the hereditament in question, although a factory, was not an " industrial hereditament " within the definition in the Rating and Valuation (Apportionment) Act, 1928, because it was primarily used for the purposes of testing operations, and as such operations were not factory purposes, the hereditament fell within the exception from rating relief under section 3 (1) (*f*) of the Act of 1928.

The company was after that decision assessed for rating purposes under section 22 (1) (*b*) of the Rating and Valuation Act, 1925; and until the coming into force of the Rating and Valuation Act, 1957, it was a matter of no practical importance to the company whether the assessment was under paragraph (*b*) or under paragraph (*a*) of section 22 (1). But the Act of 1957 gave certain rating relief to hereditaments which fell to be assessed under paragraph (*a*); and the company therefore applied to the rating authorities for the alteration of the assessment of the testing house under paragraph (*b*) from rateable value £2,500 to an assessment under paragraph (*a*) gross value £2,700, rateable value £2,247. The local valuation court for Stafford South granted the application and amended the valuation list for the county borough of Dudley rating area accordingly by substituting the assessment under paragraph (*a*) for that under paragraph (*b*). The valuation officer appealed from that decision to the Lands Tribunal, on the following grounds: That the hereditament did not consist of one or more houses or other non-industrial buildings within the meaning of section 22 (1) (*a*) of the Rating and Valuation Act, 1925 (as amended by section 5 of the Rating and Valuation (Miscellaneous Provisions) Act, 1955), and should not, therefore, be valued in accordance with section 22 (1) (*a*): that the hereditament fell to be valued in accordance with section 22 (1) (*b*) of the Rating and Valuation Act, 1925, and, accordingly, no entry should be made in respect of the hereditament in the valuation list under the column headed " Gross Value "; and that the hereditament should be entered in Part I of the valuation list with rateable value £2,250.

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[5] [1931] A.C. 450, 466; 47 T.L.R. 308.

The Lands Tribunal, in its written decision given on November 24, 1958, stated that the sole question on the appeal was whether the hereditament fell within the description of "factories, mills and other premises of a similar character used "wholly or mainly for industrial purposes" in the definition of "non-industrial building" in section 22 (4) of the Rating and Valuation Act, 1925, as amended by section 5 of the Rating and Valuation (Miscellaneous Provisions) Act, 1955.

It was agreed between the parties that if it did so fall, it should be assessed under section 22 (1) (*b*) of the Act of 1925 with a rateable value £2,250, but that if it did not so fall it should be assessed under section 22 (1) (*a*) of that Act with gross value £2,700, net annual value £2,247, rateable value £1,798.

The tribunal referred to the House of Lords decision in 1931 [6] and the description of the hereditament and the work there carried on, set out in the report of that case in the Court of Appeal (supra), and summarised the findings as to its present use, stated above.

On the contention of the parties the tribunal said that counsel for the valuation officer had contended that in construing the provisions of the Act of 1925 the provisions of the Rating and Valuation (Apportionment) Act, 1928, were irrelevant. He referred to the provisions of the original Schedule to the Act of 1925 and suggested that the amending subsection (4) was derived therefrom, and contended that "industrial purposes" should be construed in the ordinary meaning of those words as understood in 1925. He referred to the definitions of "industrial" and "industry" in the Shorter Oxford English Dictionary, the Students' English Dictionary, Chambers's 20th Century Dictionary and Webster's Dictionary, and to passages from articles on industry and various subjects using the adjective "industrial" in the Encyclopaedia Britannica (14th ed.) and Chambers's Encyclopaedia, and contended that from these definitions industry meant the manufacture and sale of articles in a commercial market, and that industrial purposes were purposes connected with industry or a particular industry; and that since an anchor chain was not saleable until tested and, in the case of those other than for the Admiralty, coated with an anti-corrosive tar preparation, the work at the hereditament fell into place in the line of manufacture and, moreover, was used for purposes connected with the particular industries of building and equipping ships and supplying cables.

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[6] [1931] A.C. 450, 468.

Counsel for the company had contended that "industrial "purposes" in section 22 (4) of the Act of 1925 should be construed in the same sense as in section 4 (2) of the Act of 1928, since by section 10 (2) of the Act of 1928 and section 84 of the Local Government Act, 1929, those Acts were to be construed as one, and words should be given the same meaning unless there was some manifest discrepancy; and he relied on *Hart* v. *Hudson Bros. Ltd.*,[7] *Phillips* v. *Parnaby*[8] and *Canada Southern Railway Co.* v. *International Bridge Co.*[9] in support of this contention. He submitted that there was no manifest discrepancy in so construing, and that it was not only possible but desirable to apply the same meaning in the two Acts. He pointed out that both Scrutton L.J. [in *Dudley Revenue Officer* v. *Lloyds British Testing Co. Ltd.*[10]] and Lord Dunedin [in *Grove* v. *Lloyds British Testing Co. Ltd.*[11]] regarded the forging of links as ancillary to testing, and contended that the tarring was of the same nature. It was clear from the decision of the House of Lords that testing was not a factory purpose.

Alternatively, he contended that even in the ordinary sense "industrial purposes" connoted productive works, and he referred to the Oxford English Dictionary definition of "industry" as showing that that was the modern prevalent sense.

The Lands Tribunal held that the amendment to section 22 by the Act of 1955 must have been drafted having in mind the provisions of the Act of 1928, and agreed with the contention for the company that the words "industrial purposes" in section 22 (4) should be given the same meaning as those words had in section 4 (2) of the Act of 1928, and that it must follow from the decision of the House of Lords that the hereditament was not used mainly for industrial purposes.

But the tribunal was satisfied that, even if one had to apply the ordinary meaning to "industrial purposes," by the references to the dictionaries "industrial purposes" connoted production processes, and that the processes for which the hereditament in question was used could not be described as productive. Nothing was produced on the premises apart from the negligible number of links, which were purely incidental to testing, and even if it could be suggested that the tar coating was a stage in the production, it could not possibly be suggested that that was

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[7] [1928] 2 K.B. 629; 44 T.L.R. 820.

[8] [1934] 2 K.B. 299; 50 T.L.R. 446.

[9] (1883) 8 App.Cas. 723, 727.

[10] [1931] 1 K.B. 404, 515.

[11] [1931] A.C. 450, 467.

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the main purpose for which the hereditament was used. It formed a very minor part and might be regarded as simply ancillary to the testing.

The tribunal was therefore satisfied that the hereditament should be assessed under section 22 (1) (*a*) of the Act of 1925, and that the appeal should be dismissed with costs, and the valuation list as amended by the local valuation court confirmed, subject to the amendment of rateable value £2,247 to net annual value £2,247, rateable value £1,798.

The valuation officer appealed.

In the case later stated for the opinion of the court on May 26, 1959, the tribunal added that, before giving the decision, the tribunal had inspected the hereditament which, after the decision of the House of Lords and until the decision of the local valuation court in the present case, continued to be valued under section 22 (1) (*b*) of the Rating and Valuation Act, 1925.

The question on which the decision of the court was desired was whether on the findings of fact the tribunal came to a correct decision in law in deciding that the hereditament was not a "factory, mill or other premises of a similar character used "wholly or mainly for industrial purposes" within the meaning of those words as used in the definition of "non-industrial building" in section 22 (4) of the Rating and Valuation Act, 1925, as amended by section 5 of the Rating and Valuation (Miscellaneous Provisions) Act, 1955.

W. L. Roots Q.C. and *Raymond Phillips* for the valuation officer. The hereditament in question is not within the words "factories, mills and other premises of a similar character used "wholly or mainly for industrial purposes," and, accordingly, falls to be valued under paragraph (*b*) of section 22 (1) of the Rating and Valuation Act, 1925, as amended by section 5 (2) of the Rating and Valuation (Miscellaneous Provisions) Act, 1955. The question is one of construction of the new subsection (4) to section 22 of the Act of 1925 enacted by section 5 (3) of the amending Act of 1955, and should be decided by starting with the wide ordinary meanings of "industrial purposes" and "factory," unfettered by any statutory limitation. The words "mainly for "industrial purposes," which appeared in the Note to Schedule 2, Part I, of the Act of 1925, were not defined in that Act and were used in a general sense; that position is continued in the amending Act of 1955 where the same words appear in subsection (4)

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under consideration. The natural meaning of "industrial purposes" is purposes "pertaining to or in the nature of industry, "or productive labour": see the definition in the Oxford English Dictionary. Similarly, the word "factory" in subsection (4) is to be given its ordinary meaning of "building . . . for the manufacture of goods," since it appears without the words "or "workshop" which usually import into rating Acts the statutory definition of "factory" in the Factory Acts.

The Lands Tribunal and the respondent ratepayers have sought to tie the words "industrial purposes" to the provisions of the Rating and Valuation (Apportionment) Act, 1928; but when that Act was passed there was no link between it and the Act of 1925 so far as the words "industrial purposes" and "factory" are concerned, and nothing in the amending Act of 1955 requires them to be given the highly specialised meanings of the Act of 1928. That Act divided hereditaments into certain categories in order to give rating relief during the industrial depression, and the phrase "industrial hereditament" first appeared in section 3 (1), which provides the only test, "for the purposes of this Act" only, for determining whether or not a particular place is an industrial hereditament. In section 3 (1) (*f*) there is a reference to "purposes . . . which are not those of a factory or workshop"; and in section 3 (2) the definitions of "factory" and "workshop" in section 149 (4) of the Factory and Workshop Act, 1901, are imported into the Act of 1928; but again they are only "for the purposes of this Act" and are confined to that Act. If a place is an industrial hereditament it may become necessary to apportion values of parts of a building as between industrial and other purposes, and for that purpose section 4 was enacted. It is in that section, in subsections (1) and (2), that the phrase "industrial purposes" is used, but not defined; and as section 4 is concerned only with the apportionment of what has already been decided to be an industrial hereditament, there is nothing which requires "industrial purposes" in section 4 to be construed as synonymous with "purposes of a factory or workshop" in section 3.

[MORRIS L.J. What is the effect of section 10 (2) of the Act of 1928 which provides that it shall be "construed as one" with the Act of 1925?]

Nothing in either Act assists in defining "industrial purposes," and nothing in the new subsection (4) to section 22 introduces the special category of "industrial hereditament." Once the special definitions in the Act of 1928 are abandoned, this testing establishment is a factory—as the House of Lords held it to be in *Grove* v. *Lloyds British Testing Co. Ltd.*[12]—or alternatively falls within the words "premises of a similar character," and in either event is used "wholly . . . for industrial purposes," given their natural meaning. The Lands Tribunal has erred in equating "industrial purposes" with "factory purposes" in the Act of 1928, and has wrongly applied the House of Lords decision in *Grove's* case,[12] which was merely that the establishment was not an industrial hereditament because it was not used primarily for factory purposes. The House of Lords did not have to consider whether it was used for "industrial purposes." Those words, construed in their general sense, would include the operations carried on in this establishment which were described in the Court of Appeal report of the case in 1931: see *Dudley Revenue Officer* v. *Lloyds British Testing Co. Ltd.*[13]

On the construction of section 22 (4), the words "used wholly "or mainly for industrial purposes" qualify only "premises of "a similar character" and do not extend to "factories, mills"; for if premises are a factory or a mill, no further inquiry is necessary. If that is the correct construction, the valuation officer must succeed. The words "premises of a similar character" were considered in *Turpin* v. *Middlesbrough Assessment Committee*,[14] when Lord Dunedin[15] said that they were not limited to the physical features of the premises; but there is no other authoritative guidance on their construction.

Though the testing process carried on in this hereditament is not a productive process, it is an industrial process and, unless the statute compels the court to do otherwise, "industrial "purposes" should be given their ordinary meaning: contrast *London Transport Executive* v. *Betts*,[16] in which the House of Lords was compelled to hold that a vast vehicle repair depot was not an "industrial hereditament" because of the word "maintenance" in section 3 (2) of the Act of 1928; but no such statutory compulsion affects the present question of construction.

These premises have always been assessed under paragraph (*b*) of section 22 (1). Now the respondents wish to be assessed under paragraph (*a*) in order to obtain the rating relief afforded to premises so assessed under the Rating and Valuation Act, 1957; and they therefore seek to show that the Act of 1925 was wrongly construed and that they have paid rates on the wrong basis for 33 years. If the valuation officer's construction is correct, they will be assessed under paragraph (*b*) as before and would not obtain the statutory reduction allowed if the tenant is actually doing the repairs; but the rateable value would be lowered if the cost of the repairs went up. The valuation officer is concerned with the basis for arriving at the repairs allowance.

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[12] [1931] A.C. 450, 466.

[13] [1931] 1 K.B. 404, 405–408.

[14] [1931] A.C. 451; 47 T.L.R. 308.

[15] [1931] A.C. 451, 470, 473.

[16] [1959] A.C. 213; [1958] 3 W.L.R. 239; [1958] 2 All E.R. 636.

Raymond Phillips following. The whole conception of an industrial hereditament is irrelevant when considering as a matter of grammar and merit whether or not a building is used for industrial purposes.

J. P. Widgery Q.C. and *David Widdicombe* for the respondent company. After the House of Lords decided in 1931 that this testing establishment was not an industrial hereditament as defined in section 3 of the Act of 1928, it was a matter of indifference financially to the company whether it was assessed under paragraph (*a*) or (*b*) of section 22 (1); but when the position was altered by the Act of 1957, they desired to obtain the new relief given to the non-industrial user which falls to be assessed under paragraph (*a*). It is conceded that the phrase "industrial "purposes" did not arise for consideration in the House of Lords in *Grove's* case[17] and that the only question there was whether the primary use of the hereditament was a factory or workshop use as those words are defined in the Factory and Workshop Act of 1901. But now, when they ask for relief for a "non-industrial "building," they are met by the argument that their purposes are industrial and therefore the relief afforded by the Act of 1957 does not extend to them. The Revenue appears to be seeking to establish a class of hereditament which is not sufficiently industrial to get industrial relief but which is too industrial to get commercial relief. The ratepayer contends that no such intermediate class exists.

The problem has to be approached on the footing that the Acts of 1925 and 1928 are enacted in one statute; that is the effect of section 10 (2) of the Act of 1928—and section 84 of the Local Government Act, 1929—requiring that the Act of 1928 is to be construed "as one" with the Act of 1925. Prima facie, therefore, the phrase "industrial purposes" must be given the same meaning throughout that notionally unified enactment, and, accordingly, the "purposes" "of a factory or workshop" in the Act of 1928 must have the same meaning as "industrial pur-"poses" in the Act of 1925 as amended by the Act of 1955.

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[17] [1931] A.C. 450, 466.

[HARMAN L.J. Can one construe an earlier Act by a later one?]

In general, no; but reliance is placed on the Act of 1955, amending that of 1925, which has to be read as one with the Act of 1928, and no further link is required: see Maxwell on Interpretation of Statutes, 19th ed., p. 34. It is true that the phrase "industrial purposes" in the Act of 1928 is limited by the words "for the purposes of this Act"; but when the two Acts are to be read together and one finds a clear and satisfactory meaning for "industrial purposes" in one part, then prima facie the same phrase in another part has the same meaning, although it is not defined. The Act of 1928 may have introduced an interpretation in order to remove an ambiguity in the Act of 1925.

[MORRIS L.J. But is it the same meaning as existed in 1925?]

Parliament, having enacted that the Act of 1928 must be construed as one with the Act of 1925, must be credited with having looked back to the Act of 1925. In section 4 (2) (*a*) of the Act of 1928 "industrial purposes" are equated with processes, the carrying on of which would render the place in which they are carried on part of a factory.

[MORRIS L.J. Does section 4 (2) do anything more than exclude a part which is "deemed" not to be a part?]

Yes; it links the Act of 1928 with the Factory and Workshop Act of 1901 and equates "industrial purposes" with Factory Act purposes. The forging of the links in this testing establishment is a factory purpose and the testing of chains a non-factory purpose, and because the latter is the major activity the hereditament is not an industrial building. *Cardiff Revenue Officer* v. *Cardiff Assessment Committee and Western Mail Ltd.*,[18] the only relevant English case on apportionment under the Act of 1928, supports the tribunal's decision that industrial purposes can be equated with factory purposes, though it is the decision of a King's Bench Divisional Court and therefore not binding on this court.

[MORRIS L.J. It is helpful authority.]

On the construction of section 22 (4), the words "used wholly "or mainly for industrial purposes" qualify not only "other "premises of a similar character" but also "factories, mills." Thus, in order not to be a non-industrial building, that is, to be an industrial building, the building must be a factory, mill or other premises of a similar character *and* used wholly or mainly for industrial, that is, factory purposes. The intended contrast is with commercial, office or residential purposes, all of which are "non-industrial."

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[18] [1931] 1 K.B. 47; 46 T.L.R. 499.

It is conceded that "factory" in the Act of 1955 must be given its ordinary meaning of a place for making things, and that it does not have the statutory meaning imported from the Factory and Workshop Act of 1901; but this testing establishment is not a factory even in the ordinary sense of the word, nor is it a mill nor any other building of a similar character. Alternatively, it is a factory not "used wholly or mainly for industrial purposes."

[MORRIS L.J. But the House of Lords has decided that it is a factory for the purposes of the Act of 1928, and that Act has to be read as one with the amending Act of 1955, so is it not a factory?]

No; because the word "factory" in the Act of 1955 is not taken from the Act of 1928 where it is used in the statutory context of "factory or workshop."

If the ratepayer's construction is wrong and "industrial "purposes" in the Act of 1925 as amended in 1955 extend to "matters pertaining to industry" and are given that loose and as yet unrestricted interpretation, doubt and difficulty will arise whenever it is necessary to decide whether other hereditaments of this character are within paragraph (*a*) of section 22 (1) or not.

Widdicombe following. On the assumption that "industrial "purposes" must be given a wide meaning, it is relevant to consider the provisions of the Anchors and Chain Cables Act, 1899, which lays down what shall be done in this testing establishment. Its provisions support the view that this establishment does not "pertain to industry" at all, but to the safety of ships and navigation.

Roots Q.C. in reply. The Rating and Valuation Act, 1957, was not intended to give relief to non-industrial buildings as such, for many non-industrial hereditaments are assessed under paragraph (*b*), as, for example, racecourses, airfields, petrol-filling stations, cemeteries. None of those are "industrial," but all fall to be assessed under paragraph (*b*) and do not obtain rating relief under the Act of 1957. The real distinction stems from the objects of section 22 (1) so far as they relate to repairs allowances. This case must depend on the construction of the new subsection (4) of section 22, and not on feelings of what may or may not be hardship. In many cases it would pay a hereditament to be assessed under paragraph (*b*), and though it suits these occupiers to be assessed under paragraph (*a*), the principle involved goes far beyond possible benefit to any single ratepayer.

Once it has been conceded that the word "factory" in section 22 (4) is not to have a statutory limitation, it becomes illogical to seek to put on the phrase "industrial purposes" the specialised meaning taken from the Act of 1928 which in turn imports the Factory Acts. This hereditament is a "factory" both under the general definition and by reason of the House of Lords decision. In any event, it is within the words "premises of a similar "character" both by reason of user and of equipment. The definition of "industrial purposes" should not be limited to "factory purposes," for that would produce, not the broad categories of hereditaments which are the subject-matter of section 22, but something quite inconsistent with them.

Cur. adv. vult.

Dec. 18. MORRIS L.J. This is a case stated by the Lands Tribunal for the decision of the Court of Appeal pursuant to section 3 (4) of the Lands Tribunal Act, 1949. The question in issue is whether, on the facts as found, the premises of Lloyds British Testing Co. Ltd. are to have their rateable value ascertained under section 22 (1) (*a*) of the Rating and Valuation Act, 1925, as amended, or under section 22 (1) (*b*). The figures which respectively become applicable on the basis of the alternative contentions are not in dispute.

[His Lordship stated the nature of the company's hereditament, cited the relevant provisions of the Anchors and Chain Cables Act, 1899, as set out above, and continued:] It is important to appreciate the nature of the work involved in the testing and finishing of chain cables. A statement in regard to it can conveniently be found in the report in the Court of Appeal of a case concerning the company to which I shall later refer. [His Lordship read from the report of *Dudley Revenue Officer* v. *Lloyds British Testing Co. Ltd.*[1] as set out above, and continued:] The Lands Tribunal have found that the hereditament is similarly used today save that the three links for the breaking test are now cut at the maker's premises and not on the hereditament, and that the amount of "forging" of links has been considerably reduced since 1931 consequent on the uses of high tensile steel for cables and this cannot be forged on the hereditament.

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[1] [1931] 1 K.B. 404, 405–408; 46 T.L.R. 601.

Section 22 of the Rating and Valuation Act, 1925, provided for the method of ascertaining the rateable value of a hereditament for the purposes of the first new valuation list to be prepared under the Act and of any subsequent valuation list. For hereditaments coming under subsection (1) (*a*) there was one method of ascertaining the net annual value; for those coming under subsection (1) (*b*) there was another. A hereditament was under (*a*) if it belonged to one of the classes specified in the first column of the table contained in Part I of the Second Schedule to the Act. A hereditament was under (*b*) if it was not such a hereditament as mentioned under (*a*). If reference is made to Part I of the Second Schedule, it will be seen that the first five classes of hereditaments are "houses and buildings without land, "other than gardens" of varying gross values. But there is an important Note to Part I of the Schedule which reads: "For the "purposes of this Part of this Schedule the expression 'houses "'and buildings' does not include mills, manufactories or "premises of a similar character used wholly or mainly for "industrial purposes or hereditaments valued as part of any "railway, dock, canal, gas, water, electricity, or other public "utility undertaking."

There was no definition of the word "manufactories" nor of the phrase "industrial purposes." The words I have quoted from the Second Schedule remained in effective operation until slightly altered in 1955. Were the premises at Dudley a manufactory or were they of a similar character to a manufactory? Were they used wholly or mainly for industrial purposes? The words to which I refer must be given ordinary reasonable meanings. The word "manufactory" was probably in 1925 synonymous with factory or workshop, but whether this was so or not, I would consider that the testing establishment would aptly be described as premises of a similar character to a manufactory. Were they used wholly or mainly for "industrial "purposes"? I would have thought clearly so. As Parliament did not define the phrase it would be inapposite to seek to do more than to decide whether or not a particular purpose does come within the phrase "industrial purpose." The phrase denotes a contrast with various other purposes such as, for example, residential purposes, or the purposes of a retail shop. An industrial purpose connotes to my mind a purpose connected with industry. If an industrial concern makes and sells chain cables and anchors, and if the concern can only sell them if it pays a testing establishment to prove and test them, I would consider that the premises of the testing establishment were being used either wholly or mainly for industrial purposes.

If I am right in my view of the position under the Act of 1925, then the question arises whether any change was made as a result of any later legislation or as a result of an amendment made in 1955 of the Act of 1925. In 1928 the Rating and Valuation (Apportionment) Act, 1928, was passed. It was required that in valuation lists certain classes of hereditaments were to be distinguished from each other and "agricultural hereditaments," "industrial hereditaments" and "freight transport hereditaments" were to be so distinguished. The Act proceeded to prescribe a highly technical definition of an industrial hereditament. Subject to a qualification it meant an hereditament occupied and used as a mine or mineral railway or as a factory or workshop. But the expressions "factory" and "workshop" were "for the purposes of" that Act to have the same meanings as in the Factory and Workshop Acts, 1901 to 1920. The qualification was that though a hereditament might be occupied and used as a "factory" or "workshop" (those words having for the purposes of the Act their meanings as in the Factory and Workshop Acts) yet it would not be an "industrial hereditament" if it were primarily occupied and used for certain specified purposes or any combination of them. One group of such purposes consisted of the purposes of a public supply undertaking. Another group of such specified purposes consisted of purposes "which "are not those of a factory or workshop." In that context again the words factory and workshop have their attributed meanings.

After the passing of the Act of 1928 and of the Local Government Act, 1929, the company sought to establish that their hereditament was an "industrial hereditament." The resultant litigation went to the House of Lords [sub nom. *Sedgwick* v. *Watney, Combe, Reid & Co. et al.* (*The Industrial Hereditaments Cases*)].[2] The final decision was adverse to the contentions of the company. In the House of Lords it was agreed and it was held that the premises came within the definition of a "factory." They were within the words "any works, warehouses, furnaces, "mills, foundries or places named in Part I of the Sixth "Schedule" of the Factory and Workshop Act. Group (13) in Part I of that Sixth Schedule consisted of "'metal and india- "'rubber works,' that is to say, any premises in which steam,

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[2] [1931] A.C. 446, 466; 47 T.L.R. 308.

" water, or other mechanical power is used for moving machinery " employed in the manufacture of machinery, or in the manufacture of any article of metal not being machinery, or in the " manufacture of india-rubber or gutta-percha, or of articles made " wholly or partially of india-rubber or gutta-percha."

Though the premises came by this rather unanticipated route within the statutory definition of a factory, they failed to qualify as an industrial hereditament, because testing, for which the premises were primarily occupied and used, was not, within the definitions of the Act of 1901, a " factory " purpose. The premises qualified to be regarded as a " factory " because there was the manufacture of articles of metal. The premises failed to qualify to be regarded as an " industrial hereditament " because it was for the testing, and not for the manufacture of metal articles, that the premises were primarily occupied and used. " Testing " did not amount to " adapting " for sale and " testing " was not within any statutorily defined factory purpose. Lord Dunedin in his speech in the House of Lords in *Sedgwick* v. *Watney, Combe, Reid & Co.* [*The Industrial Hereditaments Cases*] [3] said: " Undoubtedly, there is in the works the forging " of links to join up the chains which have been severed, and " that forging gives to the premises the character of a factory. " The Attorney-General admits this in his case, but then he says: " ' True, it becomes a factory, but it is not an industrial heredita- " ' ment because it is struck at by clause (*f*) of section 3 (1), " ' namely, being primarily occupied and used for other purposes " ' which are not those of a factory or workshop.' Now, the " question, put in this way, was, as I have said, not dealt with in " the courts below. In answer to the argument of the Attorney- " General, Mr. Comyns Carr presented an argument to this " effect: ' This is,' said he, ' admittedly a factory, but this factory " ' has only one purpose, to wit, testing. Therefore, it cannot be " ' said that it is mainly used for a purpose which is not a " ' factory purpose.' This argument is very ingenious, and seems, " at first sight, difficult to answer, but on consideration, I am " satisfied that it is unsound. One must begin by remembering " that, in considering this argument, testing alone is, ex " hypothesi, not a factory purpose. The purpose of a particular " factory must be gathered from that which makes it a factory. " If it was made a factory because it fell within an actual " description in Part I of the Schedule, you must gather the

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[3] [1931] A.C. 446, 468–469.

"purpose from that description. Here the hereditament is made "a factory because of the manufacture of articles of metal. "Therefore, so far as this hereditament is a factory, its purpose "is the manufacture of metal. But the hereditament is, without "doubt, primarily occupied and used for the purposes of testing "operations, and such operations are, ex hypothesi, not factory "purposes, consequently the case falls within the words of the "exception, and the hereditament, although a factory, is not an "industrial hereditament."

The rateable value of the testing establishment was and continued to be ascertained on the basis that it came within section 22 (1) (*b*). That meant that it was treated as being within the words "mills, manufactories or premises of a similar "character used wholly or mainly for industrial purposes." So matters remained for very many years. The company point out that until 1957 there was, however, no difference from the point of view of what amount the company would actually have to pay, whether the rateable value was assessed under section 22 (1) (*a*) or under section 22 (1) (*b*). But when the Rating and Valuation Act, 1957, was passed, the company realised that they would be more favourably placed if they could come within section 22 (1) (*a*), and they claimed accordingly. The local valuation court acceded to the company's claim and assessed the hereditament under section 22 (1) (*a*), and on appeal by the valuation officer to the Lands Tribunal this basis of assessment was upheld.

The wording of section 22 of the Act of 1925 had been by that time to some extent varied. The amendment was effected by section 5 of the Rating and Valuation (Miscellaneous Provisions) Act, 1955. The opening words of section 22 (1) (*a*) now read: "If the hereditament consists of one or more houses or "other non-industrial buildings, with or without any garden, yard, "court, forecourt, outhouse or other appurtenance belonging "thereto, but without other land." It will be seen that the phrase "non-industrial buildings" is introduced. Consequent on that, a new subsection (subsection (4)) was enacted, which reads: "In this section the expression 'house' includes part of a house, "the expression 'non-industrial building' means a building, or "part of a building, of any description, with the exception of "factories, mills and other premises of a similar character used "wholly or mainly for industrial purposes, and of premises valued "as part of—(*a*) a railway, dock, canal, gas, water or electricity "undertaking, or (*b*) any public utility undertaking not falling "within the preceding paragraph, and the expression 'appurtenance,' in relation to a dwelling-house, or to a school, college or other educational establishment, shall be taken to include all land occupied therewith and used for the purposes thereof." It will be seen that the definition of "non-industrial building" has the words of exception which closely follow the Note in the Schedule to the Act of 1925 to which I have referred above, and which was in effective operation for the 30 years between 1925 and 1955. Instead of mention of manufactories there is mention of factories. The phrase "industrial purposes" exists as before. A factory is not stated to be a factory as defined in any Act relating to factories. There is no definition of industrial purposes. All the words must, in my judgment, be given their ordinary meanings, and it seems to me that the position is not effectively altered from what it was in the years following 1925. The agreed description of the testing establishment and of the character of the equipment and the nature of the operations leads me to the view that, whether or not it could appropriately be described as a factory, it falls to be described as premises having a character similar to that of a factory. Furthermore, I consider that the premises were used wholly or mainly for industrial purposes. They were used for a purpose connected with the industry of making and selling anchors and chain cables. The view of the Lands Tribunal in the present case was that "industrial purposes" connotes production processes. With respect, I do not agree. The phrase may include production processes but it includes much else.

Though the phrase "industrial purposes" is nowhere defined, it is contended on behalf of the company that some guidance can be found by considering section 4 of the Act of 1928, and that, if so, assistance is afforded in the determination of the present case because by section 10 (2) of the Act of 1928 that Act is to be construed as one with the Act of 1925, and because in section 84 of the Local Government Act, 1929, it is provided as follows: "In this Part of this Act the expression the 'principal Act' means, in relation to places outside London, the Rating and Valuation Act, 1925, as amended by any subsequent enactment, and in relation to London, the Valuation (Metropolis) Act, 1869, as so amended as aforesaid, and the principal Act, the Rating and Valuation (Apportionment) Act, 1928, and this Part of this Act shall be construed as one, and may be cited together as the Rating and Valuation Acts, 1925 to 1929, or as "the Rating and Valuation (Metropolis) Acts, 1869 to 1929, as "the case may be."

As to the effect of this, reference may be made to *Preston and Area Rent Tribunal* v. *Pickavance*.[4] The Landlord and Tenant (Rent Control) Act, 1949, provided by section 11 (5) as follows: "This section shall be construed as one with the Act of 1946, and "references in this section to that Act shall be construed as "references to that Act as extended by section 7 of this Act." Lord Porter in his speech said[5]: "Moreover, it has to be borne "in mind that the Act of 1949 does not provide that section 11 "is to be read with section 5 of the earlier Act; it is to be read "with that Act generally and there are many other provisions of "that Act to which that reference is applicable, e.g., section "2 (1) and (3). Such an application seems to me to justify the "use of the words 'read with' in section 11 of the Act of 1949, "and negatives the necessity of confining the meaning of those "words in that Act to a notice such as would be required under "section 5 of the Act of 1946." Lord Reid said in reference to these words[6]: "In my opinion this means neither more nor less "than that section 11 must be read as if it were a section in the "1946 Act. There is no difficulty about so reading it. It does "not alter or amend anything in the 1946 Act. It adds something "new, which is materially different in character from anything "in the 1946 Act." Lord Tucker in his speech said[7]: "The "exact consequence of a provision that one Act is to be construed "as one with another, beyond incorporating the definitions "contained in the first Act, is not altogether easy to ascertain, "because it would seem that if both Acts are dealing with the "same subject-matter it would in any event in a case of "ambiguity be necessary to construe the second Act in the light "of the provisions of the first. In the present case, having regard "to section 8 of the Act of 1946, which gives power to make "procedural regulations, it would seem that in order to make it "clear that such regulations apply to applications under section "11 of the Act of 1949 some such provision as that contained in "subsection (5) was desirable."

The argument for the company is based on a consideration of section 4 of the Act of 1928. That section, which only comes into operation if a hereditament is shown to be an "industrial hereditament," provides that the valuation list must show whether an industrial hereditament is occupied and used wholly or only partly for industrial purposes, and the net annual value must when necessary be apportioned. Here again is the phrase "industrial purposes." It is not defined. Prima facie, and particularly as the Act of 1928 is to be construed as one with the existing Act of 1925, the phrase must be given its existing or ordinary meaning. In so far as any help in construction may be gleaned from the Act of 1928, it is to be noted that when in section 5 the phrase "transport purposes" is being defined there are references to "all purposes connected with." Section 4 proceeds to direct as to how to determine the proportions in which an industrial hereditament is occupied and used for industrial purposes, or, alternatively, for other purposes. There is a simple test. It is to be "deemed" to be occupied and used for industrial purposes except in so far as any part thereof is, under this Act or under the enactments relating to the regulation of mines, factories and workshops, to be deemed neither to be nor to form part of a mine, factory or workshop.

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[4] [1953] A.C. 562; [1953] 3 W.L.R. 242; [1953] 2 All E.R. 438.

[5] [1953] A.C. 562, 575.

[6] Ibid. 580.

[7] Ibid. 582.

It is said on behalf of the company that this section gives guidance as to the meaning of the phrase "industrial purposes," or, in other words, impliedly defines the phrase. It is said that an industrial purpose is equated with a factory purpose. But where Parliament has refrained from defining and has used words capable of ordinary interpretation, I cannot think that an indirect definition is to be extracted from the Act of 1928. An industrial hereditament must be either a mine or a mineral railway or a "factory" or "workshop" as these two latter words were statutorily defined by the Act of 1901. But section 4 merely says that an industrial hereditament is "deemed" to be occupied and used for industrial purposes unless any part is "deemed" not to be a part. Thus, if a mine is held to be an industrial hereditament, it is deemed to be occupied and used for industrial purposes unless under some enactment relating to the regulation of mines some part is "deemed" not to be a part of the mine. That does not involve equating an industrial purpose to or with a factory purpose: nor does it in any way limit or modify the ordinary meaning of the phrase "industrial purposes." Under section 3 (2) of the Act of 1928, it is provided that if the "industrial "hereditament" is a "factory" or "workshop" (as statutorily defined for the purposes of the Act) then the part within the close curtilage or precincts used by the occupier for the housing or maintenance of his road vehicles or as stables is to be "deemed" not to form part of the factory or workshop. Another illustration of the way in which a part of a factory or workshop is "deemed" not to form part may be found by reference to section 149 (4) of the Factory and Workshop Act, 1901. That subsection reads: "Where a place situate within the close, curtilage, or precincts "forming a factory or workshop is solely used for some purpose "other than the manufacturing process or handicraft carried on "in the factory or workshop, that place shall not be deemed to "form part of the factory or workshop for the purposes of this "Act, but shall, if otherwise it would be a factory or workshop, "be deemed to be a separate factory or workshop, and be regulated "accordingly." On the application of that subsection, a part of an "industrial hereditament" was excluded in *Cardiff Revenue Officer* v. *Cardiff Assessment Committee and Western Mail Ltd.*[8]

It was held by the Lands Tribunal that it followed from the decision of the House of Lords in 1931 that the hereditament at Dudley is not used mainly for industrial purposes. With every respect, I do not share this view. The House of Lords held that, though the testing establishment was a "factory" within the statutory definition of that word, it was not, by reason of the proviso to section 3 (1) of the Act of 1928, an "industrial hereditament," because the establishment was primarily used for testing, and because testing was not a purpose of a "factory" within the statutory definition of that word. The House of Lords never had occasion to consider section 4 of the Act of 1928 nor to consider the phrase "industrial purposes."

For the reasons which I have endeavoured to state, it does not seem to me that the "deeming" processes laid down by section 4 (2) of the Act of 1928 form any basis for seeking to ascribe to the phrase "industrial purposes" any meaning other than its ordinary meaning. When the phrase was used in the Act of 1928, it could not be that some sort of implied amendment of the Act of 1925 was being introduced. It is said that the Act of 1928 could be resolving an existing ambiguity in the meaning of the phrase as used in the Act of 1925. But it seems to me (a) that there was no ambiguity in the phrase as used in the Act of 1925; (b) that section 4 (2) of the Act of 1928 does not equate "industrial purposes" with anything; (c) that if Parliament had been intending to lay down some definition or to remove some ambiguity it would have said so and done so expressly. It is further to be noted that when in 1955 Parliament amended the

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[8] [1931] 1 K.B. 47; 46 T.L.R. 499.

Act of 1925 and introduced the phrase "non-industrial building," Parliament refrained, when defining the phrase, from incorporating the existing statutory definition of an industrial hereditament.

In my judgment, the premises of the testing establishment of the company should be regarded as being premises of a similar character to factory premises and as being wholly or mainly used for industrial purposes. It is said that, if this view be correct, the company would have the misfortune to have failed to qualify for some relief after the Acts of 1928 and 1929 and now to fail to qualify under the Act of 1957. But, in my judgment, I must be uninfluenced by this consideration and must only be guided to a conclusion by the statutory words which apply. I would answer the question raised in the case stated in the negative, and I consider that the assessment should be under section 22 (1) (*b*).

WILLMER L.J. I differ from Morris L.J. with diffidence, but for my part I have come to the conclusion that the Lands Tribunal came to a correct decision in holding that the company's hereditament ought to be valued in accordance with section 22 (1) (*a*) of the Act of 1925. The effect of this would be that the net annual value would be calculated by reference to a gross value, from which the appropriate deduction would be made in accordance with the table contained in Part I of the Second Schedule to the Act in order to arrive at the net annual value.

As a matter of history, it should be recorded that in 1931 the company sought to obtain relief under section 68 of the Local Government Act, 1929, on the ground that the hereditament was an "industrial hereditament" within the meaning of section 3 (1) of the Rating and Valuation (Apportionment) Act, 1928. That attempt failed because, although it was conceded that the hereditament was a "factory," as being within paragraph (13) of Part I of the Sixth Schedule to the Factory and Workshop Act, 1901, it was decided by the House of Lords in *Grove* v. *Lloyds British Testing Co. Ltd.*[9] that it was not an "industrial hereditament" within the meaning of the Act of 1928. The work of forging links was sufficient to make the hereditament a factory, but it was not an "industrial hereditament" because, in the view of the House of Lords, it was primarily occupied and used for the purpose of merely testing the cables, which was not a factory purpose.

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[9] [1931] A.C. 450, 466; 47 T.L.R. 308.

From 1931 onwards until 1957 it made little or no financial difference to the company whether the hereditament was assessed under paragraph (*a*) or (*b*) of section 22 (1) of the Act of 1925. But by the Rating and Valuation Act, 1957, a measure of relief was accorded in the case of a hereditament, other than a dwelling-house, private garage or private storage space, whose net annual value was calculated by reference to its gross value, that is, in accordance with section 22 (1) (*a*). In the present proceedings the company have sought to claim the benefit of this relief, and have claimed that their hereditament consists of non-industrial buildings which ought to be assessed under that paragraph. They are met, however, with the contention that their hereditament is excluded by the definition of " non-industrial building " contained in section 22 (4), as enacted by section 5 (3) of the Rating and Valuation (Miscellaneous Provisions) Act, 1955. The material words of the definition are as follows: " 'non-industrial building' " means a building, or part of a building, of any description, with " the exception of factories, mills and other premises of a similar " character used wholly or mainly for industrial purposes . . ."

If the valuation officer's contention be right, the effect would be that the company, having been shut out from relief under the Local Government Act, 1929, on the ground that their hereditament was not an industrial one, would now find themselves equally shut out from relief under the Act of 1957 on the apparently diametrically opposite ground that their hereditament is not a non-industrial building. Prima facie this would be a strange result, and it seems to me that the grounds on which the valuation officer's argument is based require careful examination.

The valuation officer's contention in the first place is that the building in question is a factory, as conceded in the litigation in 1931, and as found by the House of Lords. That, according to the valuation officer, is the end of the matter, because it is argued that the word " factories " in section 22 (4) is not qualified by any of the words which follow. On this point I find his argument wholly unacceptable. In my judgment, the words " used wholly or mainly for industrial purposes " must be construed as governing each of the three categories previously mentioned, namely, " factories," " mills " and " other premises " of a similar character." That is the natural way to read the words. Had the draftsman not intended the words " factories " and " mills " to be so qualified, he could, and I have no doubt would, have made such intention plain, for example, by numbering or lettering the various categories, so that the material words would read: " with the exception of: (*a*) factories; (*b*) mills; and " (*c*) other premises of a similar character used wholly or mainly " for industrial purposes."

The valuation officer's next contention is that, even assuming the word " factories " to be qualified by the words that follow, the expression " industrial purposes " is to be construed in a broad sense as meaning any purposes connected with industry; and the testing of cables, it is argued, is a process connected with the industrial process of producing cables. The company's hereditament, therefore, would still fall within the exception, and consequently outside the definition of " non-industrial building." The company's answer to this argument is that the Act of 1925 (as amended in 1955) is to be construed as one with the Act of 1928, so that prima facie the same words and phrases should be construed in the same sense in the two Acts. So far the company's contention appears to me to be unassailable, for section 84 of the Local Government Act, 1929, provides as follows: " In this Part of this Act "—that is, Part V, which deals with rating and valuation—" the expression the ' principal Act ' means, " in relation to places outside London, the Rating and Valuation " Act, 1925, as amended by any subsequent enactment . . . and " the principal Act, the Rating and Valuation (Apportionment) " Act, 1928, and this Part of this Act shall be construed as " one. . . ."

I entertain no doubt, therefore, that it is not only permissible but necessary to refer to the provisions of the Act of 1928 in order to construe section 22 (4) of the Act of 1925, as enacted by the Act of 1955. I look, accordingly, at section 3 (1) of the Act of 1928 for the definition of " industrial hereditament," which, omitting immaterial words, is in the following terms: " In this " Act the expression ' industrial hereditament ' means a heredita- " ment . . . occupied and used . . . as a factory . . . : Provided " that the expression industrial hereditament does not include a " hereditament occupied and used as a factory . . . if it is prim- " arily occupied and used for the following purposes . . . (*f*) any " other purposes, whether or not similar to any of the foregoing, " which are not those of a factory . . . " By subsection (2) the expression " factory " is defined as having the same meaning as in the Factory and Workshop Acts, 1901 to 1920.

So far, then, the result is that a hereditament, although it be a factory within the meaning of the Factory and Workshop Acts, is not an industrial hereditament—that is to say, it is a non-industrial hereditament—if it is primarily occupied and used for purposes which are not those of a factory.

The expression " industrial purposes," which is the expression we have to construe in this case, occurs first in section 4, which deals with apportionment of the net annual value in the case of an industrial hereditament occupied and used partly for industrial purposes and partly for other purposes. The material part of this section provides as follows: " 4.—(1) In every valuation list every " industrial hereditament occupied and used wholly for industrial " purposes shall be shown as being so occupied and used, and as " respects every such hereditament occupied and used partly for " industrial purposes, the net annual value thereof shall be shown, " in the prescribed manner, as being apportioned between the " occupation and user of the hereditament for industrial purposes, " and the occupation and user thereof for other purposes. (2) For " the purpose of determining in what proportions an industrial " hereditament is occupied and used for industrial purposes and " for other purposes respectively, the following provisions shall " have effect:—(*a*) The hereditament shall be deemed to be occupied and used for industrial purposes except in so far as any " part thereof is, under this Act or under the enactments relating " to the regulation of mines, factories and workshops, to be " deemed neither to be, nor to form part of, a mine, factory, or " workshop . . ."

The reference to a hereditament any part of which is deemed not to form part of a factory is clearly a reference to section 149 (4) of the Factory and Workshop Act, 1901, whereby it was enacted that a place within a factory, which is used solely for some purpose other than the manufacturing process carried on in the factory, shall not be deemed to form part of the factory. " Industrial purposes " are thus contrasted with purposes other than the manufacturing process carried on in the factory, that is, purposes other than those which make it a factory. Reading sections 3 and 4 of the Act of 1928 together, therefore, the conclusion seems to me to be irresistible, that the expression in section 3 (1) (*f*), " other purposes . . . which are not those of a factory," must mean purposes which are not " industrial purposes." This explains why it is enacted that a hereditament primarily occupied and used for such purposes, that is, purposes which are not " industrial purposes," is not an " industrial hereditament."

In my judgment, therefore, the true effect of sections 3 and 4 of the Act of 1928 is to equate " industrial purposes " with factory purposes—that is, the purposes which make the hereditament a factory—and "other purposes" with purposes other than factory purposes—that is, other than the purposes which make the hereditament a factory. If that is the meaning of the words "industrial purposes" in the Act of 1928, I think that they must be held to bear the same meaning in section 22 (4) of the Act of 1925, as enacted by the Act of 1955.

What, then, is the result in relation to the company's hereditament? The House of Lords has decided that the work of testing cables, which is the purpose for which the hereditament is primarily occupied and used, is not a factory purpose. It is not, therefore, an industrial purpose. Consequently the hereditament does not fall within the exception in section 22 (4), for it is not a factory used wholly or mainly for industrial purposes. It is, therefore, a "non-industrial building," and as such ought to be valued, as the Lands Tribunal held, in accordance with section 22 (1) (*a*).

I venture to think that the construction which I have put on the words "industrial purposes" is not only consonant with common sense, but also ensures consistency between the Acts of 1925 and 1928, which are to be read as one. At least it has the merit of avoiding the absurdity of holding that a hereditament, which has been held not to be an "industrial hereditament," is at one and the same time not a "non-industrial building." For these reasons, I am of the opinion that the appeal should be dismissed.

HARMAN L.J. In my judgment also, this appeal should be dismissed. As the court is not unanimous, I shall explain the reasons for my view as shortly as I may.

The statute to be construed is the Rating and Valuation Act, 1925, s. 22, as amended by the Rating and Valuation (Miscellaneous Provisions) Act, 1955, s. 5. Under section 22 as it originally appeared in the Act of 1925, all real property was described as hereditaments: these were divided into two categories, one described in section 22 (1) (*a*) and the other in (*b*). Category (*a*) consisted of hereditaments belonging to one of the classes specified in the Second Schedule, which were all there described as "houses and buildings," and (*b*) of "all other "hereditaments"; and by the Note to Part I of the Second Schedule to the Act there were excluded from the expression "houses and buildings" "mills, manufactories or premises of a "similar character used wholly or mainly for industrial purposes."

It will be observed that the word "hereditaments" is used to cover houses and buildings. Apparently it did not matter to the company whether the hereditament in question came within (*a*) or (*b*), the net annual value amounting to the same in either case. It was classed under (*b*).

In 1928 there was passed the Rating and Valuation (Apportionment) Act of that year designed to give relief to what were there called industrial hereditaments. To these were given certain relief, within which the respondent company sought to bring itself. The question whether it could do so gave rise to *Grove* v. *Lloyds British Testing Co. Ltd.*,[10] which was eventually decided in the House of Lords. The House there held that the company could not claim relief under the Act of 1928 because the hereditament, that is to say, the company's building, was not an industrial hereditament. It is not for us to question that decision.

The Act of 1955 amended the Act of 1925, s. 22 (*a*), by classifying all the hereditaments included in it as "houses or "other non-industrial buildings," by substituting a new table, and by striking out the Note. It also added a new subsection (4), of which the part here material has already been read by Morris L.J. I may say at once that I construe the words "wholly or mainly," etc., as applying to factories. The company's property continued to appear in the list under section 22 (1) (*b*) of the Act of 1925. There was still no advantage to be gained by arguing that it fell within section 22 (1) (*a*). This, however, became a live question after the passing of the Rating and Valuation Act, 1957, which gave further relief to hereditaments of which the net annual value was an amount ascertained by reference to gross value as defined in section 68 of the Act of 1925. Now this relief only applied to hereditaments which could be brought within section 22 (1) (*a*) and not to those within section 22 (1) (*b*). The company applied to the local valuation court, which in 1958 decided in their favour by classifying their building as being within category (*a*): on appeal to the Lands Tribunal this decision was affirmed. The valuation officer now appeals to this court.

It will thus be seen that in order to come within category (*a*) the company must prove that their building is a "non-industrial

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[10] [1931] A.C. 446, 466; sub nom. *Sedgwick* v. *Watney, Combe, Reid & Co. and several other Appellants and Respondents. The Industrial Hereditaments Cases.*

" building." These are the words to be construed by the court, and not the words " industrial purposes," though, no doubt, it was the purpose of subsection (4) to explain the former by the latter. Should the appeal be successful, it would follow that the company's building, though not ranking as an industrial hereditament under the Act of 1928 having regard to the decision of the House of Lords, will yet rank as an industrial building for the purposes of the Act of 1925, as amended by the Act of 1955. This would be a most bizarre result, for, after all, a building is only one sort of hereditament, as the Act of 1925 recognises. This word is now used chiefly in connection with rating, though the conveyancer still not infrequently writes " lands and hereditaments " in his parcels. Hereditaments, of course, originally meant any species of property which would descend to the heir-at-law, and it is still so defined in the Law of Property Act, 1925. By section 205 (1) (ix) of that Act land is said to include buildings . . . and other corporeal hereditaments, and hereditaments to mean any real property which on an intestacy before the Act might have devolved upon an heir. In the Rating and Valuation Act, 1925, s. 68 (1), " 'Hereditament' means any lands, " tenements, hereditaments or property which are or may become " liable to any rate . . ." Moreover, the Acts of 1925, 1928 and 1955 are all to be read together, as provided by section 10 (2) of the Act of 1928 and section 84 of the Local Government Act, 1929, and therefore the expressions in all of them must be construed as if contained in one Act—see Selborne L.C.'s observation in *Canada Southern Railway Co.* v. *International Bridge Co.*[11]: " It is to be observed that those two Acts are " to be read together by the express provision of the 7th and " concluding section of the amending Act; and therefore we must " construe every part of each of them as if it had been contained " in one Act, unless there is some manifest discrepancy, making " it necessary to hold that the later Act has to some extent " modified something found in the earlier Act." It follows, in my judgment, that the two expressions " industrial hereditaments " and " industrial buildings " ought to receive the same interpretation in the absence of some manifest discrepancy making a different interpretation necessary. For my part, I can find no such discrepancy, and that is enough, as the Lands Tribunal held, to dispose of this appeal.

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[11] (1883) 8 App.Cas. 723, 727.

The argument for the valuation officer was that the House of Lords in the case in 1931 did not decide that this building was not being used for industrial purposes but only that for the purposes of relief under the Act of 1928 the building was not an industrial hereditament because it was not primarily used for factory purposes. The House held that the only portion of the building used for those purposes was a small portion used as a forge for working metal and that was not the primary purpose for which the building was used, which was for testing purposes. It was argued that it did not follow that the main purpose, though not a factory purpose, was not in the ordinary sense of the word an industrial purpose, and reliance was placed on section 4 of the Act of 1928, which has been dealt with by Morris L.J. in his judgment. I agree that this is so and that the testing operations, which are the main purpose of the factory and are described in the report of the case in 1931,[12] might, if there were no other guide, properly be described as industrial as being connected with industry, that is to say, the industry of making anchors and chains; but this method of reasoning lands the user of it in the absurdity described above and in giving to the same expression used in two Acts which are to be read together a different meaning: quod est absurdum, as Euclid has it. I therefore feel constrained to reject this line of reasoning and to conclude that, read in the light of the Act of 1928, it is right to hold that for this purpose industrial purposes must be tantamount to factory purposes. This is the only way I can see to construe the two Acts consistently. The principle of interpreting an earlier Act by a later one where both are concerned with the same subject-matter is well established, as appears from Maxwell on Statutes (10th ed., pp. 33 and 35), and the cases there cited.

Appeal dismissed with costs.
Question in case stated answered in the affirmative.
Leave to appeal to the House of Lords granted.

Solicitors: *Solicitor, Inland Revenue; Gregory, Rowcliffe & Co. for Shakespeare & Vernon, Birmingham.*

M. M. H.

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[12] [1931] 1 K.B. 404, 405–408.

REGINA *v.* BURT. *Ex parte* PRESBURG.

1960
Jan. 22.

Lord Parker C.J., Cassels and Ashworth JJ.

Costs—Justices—Penalty in guise of costs—Attendance of salaried person necessary for prosecution—Prosecution not legally represented—Evidence by police officer — Whether prosecution incurred costs—"Costs"—Whether order just and reasonable—Costs in Criminal Cases Act, 1952 (15 *&* 16 *Geo.* 6 *&* 1 *Eliz.* 2, *c.* 48), *s.* 6 (1).

The applicant appeared before a stipendiary magistrate to answer an information charging him with an offence under section 49 of the Road Traffic Act, 1930, and pleaded not guilty. The police were not represented at the hearing, but a police officer attended and gave evidence and the prosecution case consisted solely of his evidence. The magistrate convicted the appellant, and, having fined him 20s., ordered him to pay £2 2s. costs. On an application for an order of certiorari to bring up and quash that part of the magistrate's order relating to costs, on the grounds, inter alia, that under section 6 (1) of the Costs in Criminal Cases Act, 1952,[1] the magistrate might only order such costs as he thought just and reasonable and that, since costs could not include any sum of money as compensation for the salary paid to a police officer, the prosecution had in fact incurred no costs, so that the costs awarded were neither just nor reasonable; alternatively, that the sum was plainly excessive, and therefore the award was made without jurisdiction:—

Held, that "costs" in section 6 (1) was not confined to disbursements and expenses properly so-called, but included the expenses to which a prosecutor was put when the activities of a person, such as a police officer, to whom he paid a salary were necessary in or about the prosecution, so that it was wrong to say that the prosecution had incurred no costs; that, in considering the costs which the prosecution had so incurred, regard should be had to the whole structure of police organisation and not to the amount of pay which the police officer would receive in respect of the time he had spent in attendance at court; and that, in the circumstances, it had not been shown that £2 2s. was such a sum as could not represent the costs incurred by the prosecution.

Attorney-General v. *Shillibeer* (1849) 19 L.J.(N.S.)Ex. 115; 4 Ex. 606 applied.

APPLICATION for an order of certiorari.

The following facts appeared from the affidavits filed in support of the application: The applicant, David Presburg, was summoned to appear at Bow Street Magistrates' Court on March 11, 1959, at 2.15 p.m. to answer an information alleging that he had failed to conform to the indication given by a traffic sign, contrary to section 49 of the Road Traffic Act, 1930 (as amended). The applicant duly appeared in answer to the summons and pleaded not guilty. He was represented by a solicitor. The police were not represented but a police officer attended and gave evidence, and the prosecution case consisted solely of his evidence. At the conclusion of the hearing the magistrate [Mr. Clive Burt Q.C.] said that he found the case proved, and he convicted the applicant and fined him 20s. and ordered him to pay £2 2s. costs. The applicant's solicitor thereupon asked the magistrate why he had ordered costs and the magistrate said: "Because I say so." The solicitor pointed out that the police had not been represented and the magistrate replied: "That is my order." At no time did the magistrate ask either the police or the clerk of the court whether in fact or to what extent the prosecution had incurred costs.

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[1] Costs in Criminal Cases Act, 1952, s. 6: "(1) On the summary "trial of an information a magis-"trates' court shall have power to "make such order as to costs—(*a*) on "conviction, to be paid by the accused "to the prosecutor; . . . as it thinks "just and reasonable."

S. 17: "(1) In this Act . . . "'Prosecutor' includes any person "who appears to the court to be a "person at whose instance the prose-"cution has been instituted, or under "whose conduct the prosecution is at "any time carried on."

The applicant sought an order of certiorari to bring up and quash that part of the magistrate's order whereby he was ordered to pay £2 2s. costs on the grounds that the magistrate's only jurisdiction to make him pay costs was to make him pay such costs as the magistrate thought to be just and reasonable, and that (a) the prosecution had in fact incurred no costs and the costs awarded were neither just nor reasonable; (b) the costs ordered and awarded were not awarded as costs, but as a fine or penalty; (c) the magistrate had no power to inflict a fine or penalty; (d) the magistrate never thought that the costs he so awarded were just or reasonable; and (e) in the premises, the magistrate exceeded his jurisdiction and acted improperly.

According to the magistrate's affidavit bringing to the attention of the court certain facts which he considered to have a material bearing on the question at issue: "After deciding to "convict the applicant and to impose a fine upon him I "considered what costs had been incurred by the prosecution as "I thought that it was a case in which it would be just to make "a reasonable contribution to the prosecution for the costs which "had been incurred. I appreciated that the prosecution had not "been legally represented, and that the Metropolitan Police had "been involved in the trouble and loss of time inevitably incurred "in carrying on the prosecution. In particular I had regard to "the fact that for that purpose it had been necessary for Police "Constable Skinner to attend at court and give evidence on the "day of the hearing. I estimated that the Metropolitan Police "had thus been prevented from employing Police Constable "Skinner upon other police duties for half a day. I took the view "that it was reasonable in these circumstances to order the "applicant to pay the sum of £2 2s. as a fair contribution to the "costs that had been incurred by the prosecution by appropriation "to the case of the time of the police force." As to the grounds on which the applicant sought relief, the magistrate deposed that he had taken the view that the prosecution had in fact incurred costs as described above, that he did not make the order for costs as a fine or a penalty but as a contribution to the costs which he considered had in fact been incurred, and that he had thought that the costs which he awarded were just and reasonable having regard to the matters set out above.

James Miskin for the applicant. Where jurisdiction depends upon the existence of a collateral fact the tribunal exercising that jurisdiction must first decide as to that collateral fact. Costs can be no more than an indemnity and, therefore, the jurisdiction to make an award depends upon whether they have been incurred. It follows that it is open to this court to inquire upon affidavit evidence whether or not costs have in fact been incurred. No "costs" within the meaning of section 6 (1) of the Costs in Criminal Cases Act, 1952, were incurred by the prosecutor. "Costs" cannot include a sum of money as compensation for the proportion of the salary paid to a police officer in respect of the time spent by him in court as a witness. In *Attorney-General* v. *Shillibeer*[2] it was held that the Crown was entitled to costs in respect of the salary paid to the Crown Solicitor, but that case should be distinguished in that the Crown Solicitor was carrying out work normally done by a barrister or solicitor, that is, work for which fees are normally paid. It does not follow that a prosecutor who employs a police officer at a salary for the purpose of apprehending offenders is entitled to be awarded part of that police officer's salary. If the magistrate's award is right, it would mean that in every case in which police officers are concerned, not only in apprehending offenders but in, for example, watching premises, the prosecutor would be entitled to receive as costs the proportionate part of their salaries in relation to the time they had spent on the case. But that proportion could not be costs. The work done by the police officers would be work which they were employed to do, and their salaries would continue to be payable under the terms of their contracts of employment, irrespective of the time spent on the case. Unlike a witness employed by the hour, or the day, who must be compensated for his loss, no one in this case has suffered any loss at all.

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[2] (1849) 19 L.J.Ex. 115; 4 Ex. 606.

The scope of the costs which under section 1 of the Act of 1952 a court of assize or quarter sessions may order to be paid out of local funds is expanded by subsection (2) to include sums reasonably sufficient "to compensate the prosecutor, or . . . "the accused, for the expenses properly incurred" in carrying on the prosecution or defence and "to compensate any witness ". . . for the expense, trouble or loss of time" incurred in his attendance and giving evidence: see also the similar provision in section 5 (3) in relation to costs awarded out of local funds by a magistrates' court. There is there a significant distinction between what sums may be awarded to the prosecutor and to witnesses, and the latter only are entitled to compensation. That section 6 contains no similar provision enlarging the scope of the "costs" which may be awarded by magistrates' courts as between party and party bears out the argument that "costs" in section 6 (1) cannot include any sum by way of compensation as ordered here, but covers only actual expenses incurred. The Witnesses' Allowances Regulations, 1955 [S.I. 1955, No. 1655 (L.13)], made under section 12 of the Act, relating to compensation awarded to witnesses under sections 1 (2) and 5 (3) of the Act, regulation 11 of which excludes payment to a member of a police force attending in his capacity as such, are also of significance as indicating that Parliament intended police officers to be in a special position.

There is a discretion as to costs up to the amount of an indemnity, but there is no jurisdiction to award any sum extending beyond an indemnity. The magistrate stated that this sum was awarded as a "fair contribution" to the costs incurred by the prosecutor by appropriation to the time of the police officer. But a "contribution" must be a part of the whole, and £2 2s., even if considered as compensation and not contribution, is excessive for the time of one police officer for half a day; on that basis his salary would be over £26 a week. Where an award of costs is so wholly out of proportion to the actual costs incurred, the inference is that it was made by way of a fine or penalty.

[Reference was also made to *Reg.* v. *Highgate Justices, Ex parte Petrou* [3] and *Attorney-General* v. *Clark*.[4]]

J. R. Cumming-Bruce as amicus curiae. *Attorney-General* v. *Shillibeer* [5] was applied by the Court of Session in *Lord Advocate* v. *Stewart (No. 2)*.[6] There is no valid distinction in this respect between a salary paid to a police officer and any other salary which a prosecutor has to pay to persons whose activities are necessary to the discharge of his function as a prosecutor. Section 6 (1) of the Act of 1952 gives a wide and unfettered discretion and imposes on the court the duty of determining what is a reasonable sum which one party should pay to the other in respect of costs. The court, therefore, must decide and, if necessary, hear evidence, as to the expenses incurred by the prosecutor in bringing the case to court. While it would not be right to regard as the costs of the prosecutor expenditure relating to the time of the police if there were no reasonable nexus with the particular prosecution, what is reasonable is a question of fact in each case. The salary of the police officer concerned is not the measure of the prosecutor's expenses. The maintenance of the police force, which requires an establishment with, for example, buildings, motor-vehicles and items of a capital nature and also the employment of many persons such as telephonists and typists, must be taken into consideration. The prosecutor here must be taken to be the Commissioner of Metropolitan Police (see section 17 (1)); he does not maintain a police force and pay police officers for the purposes of laying informations and carrying on prosecutions, but to carry out the duties of preserving the peace and apprehending offenders and bringing them to justice, which duties involve the institution of legal proceedings. If a police officer has to attend at court the commissioner incurs the expense of paying another police officer to carry out the duties which that police officer would otherwise have performed, and he incurs such expenses arising out of a shift of duties not only in respect of the police officer who attended at court but also in respect of the other police officers who were concerned at various stages of the prosecution. It is, therefore, unreal to say that the award of the magistrate means that the time of one police officer is worth £26 a week, and, having regard to the true expense incurred by the prosecutor in order to enable this police officer to attend at court for half a day, £2 2s. cannot be said to be extravagant. In any event, the applicant has not discharged the onus on him of showing that the magistrate was wrong in his estimate of what was a reasonable amount, or, if he was wrong, that the award was so out of proportion that this court ought to interfere. Nor is there anything to indicate that the magistrate was seeking to award costs other than as a contribution or an indemnity.

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[3] [1954] 1 W.L.R. 485; [1954] 1 All E.R. 406.

[4] [1909] 2 K.B. 7; 25 T.L.R. 318.

[5] 19 L.J.Ex. 115.

[6] (1899) 63 J.P. 473.

"Costs" in section 6 (1) of the Act of 1952 is not limited to direct disbursements. The Act of 1952 is a consolidation Act made under the Consolidation of Enactments (Procedure) Act, 1949, and provisions previously contained in earlier statutes must be construed as making no substantial change in the existing law. Section 6 of the Act of 1952 derives from and, with minor modifications, substantially re-enacts, section 18 of the Summary Jurisdiction Act, 1848, which gave courts of summary jurisdiction power to award costs as between party and party; the discretion there given was unfettered, and "costs" in section 18 of that Act, and consequently in section 6 of the Act of 1952, is wide enough to include indirect expenses, such as those arising from a shift of duties, incurred by the prosecutor. Sections 1 and 5 of the Act of 1952 are concerned with payments out of local funds and derive from 25 Geo. 2, c. 36, s. 11, and 27 Geo. 2, c. 3, s. 3, re-enacted in the Criminal Law Act, 1826, and the Costs in Criminal Cases Act, 1908, in substantially the same words. There is no reason why the expenses which a successful prosecutor may recover under section 6 (1) should be limited to those incurred through legal representation or in obtaining witnesses.

Miskin replied.

LORD PARKER C.J. In these proceedings Mr. Miskin moves on behalf of David Presburg for an order of certiorari to bring up and quash a decision of a stipendiary magistrate, Mr. Clive Burt Q.C., given on March 11, 1959, whereby he convicted the applicant of an offence under the Road Traffic Act, 1930, fined him 20s. and ordered him to pay £2 2s. costs. The application is in fact, if I understand it aright, to bring up the order and to quash merely that part of it which orders the payment of £2 2s. costs.

This was a very simple case in which an information was laid by a police officer against the applicant for, in effect, crossing a traffic light when the lights were against him. The case was ordered to come on in the afternoon of Wednesday, March 11, when a police officer alone attended, the police not being represented, and gave evidence, and he may or may not have cross-examined the applicant. The note says that the applicant was cross-examined, but it may be that that was cross-examination by the court.

In the affidavit sworn by the applicant and his solicitor, it appears that at the end of the case, after the magistrate had found the case proved and fined the applicant 20s., he ordered him to pay £2 2s. The solicitor asked: "Might I ask why you have "ordered costs?" The magistrate replied: "Because I say so." The solicitor then said: "But the police are not represented," and the magistrate replied: "That is my order."

It is urged in this court that that order for the payment of £2 2s. costs was in excess of the magistrate's jurisdiction. The argument can be summarised in this way: It is said that costs are no more and can be no more than an indemnity; that before the magistrate exercises his jurisdiction to award costs he must find as a fact that costs have been incurred, and that that is a collateral fact upon which his jurisdiction is founded, and by the wrong finding of a collateral fact he cannot give himself jurisdiction. So far, I think the argument is absolutely sound. It is then said that costs cannot include any sum of money as compensation for the salary paid to a police witness. Quite shortly, it is said that this police officer was employed; he was getting his salary whether he was there or whether he was not, and no expense had been incurred.

Before considering the matter more closely, it is necessary to look at the Costs in Criminal Cases Act, 1952, under which the magistrate's jurisdiction arose. The relevant section is section 6, and it is in the widest possible terms: "(1) On the summary "trial of an information a magistrates' court shall have power "to make such order as to costs—(*a*) on conviction, to be paid "by the accused to the prosecutor; (*b*) on dismissal of the "information, to be paid by the prosecutor to the accused, as it "thinks just and reasonable." What, then, is included in the word "costs"? One argument addressed to us by Mr. Miskin, to whom, incidentally, the court is indebted for his careful argument, is by reference to other sections of the Act where reference is made to costs, and it is stated what costs are there being dealt with. Thus, in section 1 (2), which is concerned with costs awarded by assizes and quarter sessions out of local funds, it is provided: "The costs payable out of local funds under the "preceding subsection shall be such sums as appear to the court "reasonably sufficient to compensate the prosecutor, or as the "case may be the accused, for the expenses properly incurred by "him in carrying on the prosecution"—that is to the prosecutor—"or the defence and to compensate any witness for the "prosecution, or as the case may be for the defence, for the "expense, trouble or loss of time properly incurred in or incidental to his attendance and giving evidence." Pausing there, it is said that that subsection draws a distinction in regard to costs paid to the prosecution and costs paid to a witness. Costs paid to a witness are to include not merely expense but something for his trouble and loss, whereas, it is said, in the case of the prosecutor there is no compensation for trouble or loss but only for expenses, which means the actual expenses which he incurs. A similar provision is contained in section 5 (3) in regard to costs to be awarded by magistrates' courts out of local funds. It is said, accordingly, that when one comes to section 6 (1), "costs" there, in relation to the prosecutor's costs, mean no more than the costs which could be paid to the prosecution under the earlier provisions dealing with payment out of local funds and, properly construed, cover only actual expenses incurred. It is, I think, sufficient to say in answer to that argument that section 1 (2) and section 5 (3) have their origin in a completely different set of legislation from that from which section 6 (1) is derived.

Mr. Cumming-Bruce, who has appeared here as amicus curiae, and has assisted the court very considerably, has traced the history of these sections, and whereas the provisions for payment out of local funds can be traced to a series of Acts beginning in 1752 and culminating in the Costs in Criminal Cases Act, 1908, section 6 derives directly from the Summary Jurisdiction Act, 1848, s. 18. It is quite clear, in my judgment, that those are two completely separate codes, and, the Costs in Criminal Cases Act, 1952, the present Act, being an Act made under the Consolidation of Enactments (Procedure) Act, 1949, there is no reason whatsoever for reading "costs" in one part of the Act as meaning the same as "costs" in another part of the Act. Again, reference was made to the fact that in regard to the costs that may be awarded out of local funds, the Home Secretary has power to make regulations. That is derived from section 12 of the Act, and those regulations, the Witnesses' Allowances Regulations, 1955 [S.I. 1955, No. 1655 (L.13)] expressly provide in regulation 11: "(1) Notwithstanding any-"thing contained in the preceding regulations no sum shall be "allowed under these regulations in respect of (*a*) a member of "a police force attending court in his capacity as such." Mr. Miskin concedes, of course, as he must, that those are regulations made under the provisions dealing with the award of costs out of local funds; but he can, at any rate, say this, that police officers are looked upon as being in a peculiar position, and that so far as those provisions are concerned, nothing will be awarded to a police officer attending court as a witness on behalf of the prosecution. As I have said, I do not think that any help is to be derived from those other sections and regulations in construing section 6 of this Act.

What, then, is included in the word "costs"? Must it be confined and confined only to disbursements and expenses properly so called? I confess that I should be surprised if it was necessary to confine the word "costs" in that limited way. An illustration was given in the course of the argument of some of these big stores today who employ private detectives and others to keep an eye on shoplifters. If such an employer uses one of his salaried staff in and about the prosecution of an offender, is it to be said that the employer has been put to no expense? It seems to me that he has been put to expense in that he has employed a member of his salaried staff to do that and thereby lost that man's labour for the time being, and is put to the expense of having to find another person to perform the work which the first employee would otherwise be doing.

The matter, to my mind, is put beyond argument by an old case—which is none the worse for that—to which we have been referred, *Attorney-General* v. *Shillibeer*.[1] In that case there was an excise information in which the Crown had the services of the Crown Solicitor. The Crown Solicitor was a salaried employee of the Crown. The Crown succeeded and was awarded costs, and it was said that the Crown by making a special bargain with its solicitor, not employing a solicitor ad hoc, but paying the Crown Solicitor a salary, could not recover the solicitor's costs which otherwise would have been recovered if an outside solicitor had been employed. The judgment of the court was delivered by Parke B., and I must read some of his judgment. He said[2]: "There was "an objection made that the plaintiff was bound under the statute

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[1] (1849) 19 L.J.Ex. 115; 4 Ex. 606.

[2] 19 L.J.Ex. 115, 117.

"2 & 3 Will. 4, c. 120, s. 121, which gives costs, and could not "charge the ordinary costs against the subject, because the "Crown employed the solicitor of the Excise at an annual salary, "and did not incur any expenditure in matters depending in the "particular suit. We took time to consider the case, and we are "clearly of opinion that that argument ought not to prevail, "and that the Crown is entitled to full costs in the suit." He went on to say[3]: "Then it was said that it is the fault of the "Crown, because they have made such a bargain with the solicitor that they cannot tell how much salary is paid for the "costs of a particular suit since they made such a bargain with "the solicitor. We think that objection really has no weight. "The Crown has a solicitor, and makes a perfectly fair bargain "with him, very much to the benefit of the public, and we "think that ought to make no difference in the case." To much the same effect was a Scottish case, *Lord Advocate* v. *Stewart* (*No. 2*).[4]

In my judgment, there is no distinction between that case and the case of the salary paid to a police officer, or any other salary which a prosecutor has to pay to a person whose activities are necessary in and about a prosecution. It matters not that, unlike the case of *Shillibeer*,[5] the person to whom the salary is paid is not a solicitor or a professional man.

Mr. Miskin, however, goes further, and says that even if it is right to say that some costs can be said to have been properly incurred by the prosecution here, yet the sum of £2 2s. which was awarded is so plainly excessive that it appears on its face to be a fine and, therefore, to have been imposed without jurisdiction. The onus, of course, in a case such as this of showing that the collateral facts are such that the magistrate had no jurisdiction is on him who asserts it, namely, the applicant. The applicant, accordingly, must show that the costs properly incurred could not equal or exceed £2 2s. For my part, the applicant has totally failed to satisfy me on that point. It is quite wrong to make a rough calculation of what the pay of a policeman would amount to for four hours one afternoon. It seems to me that you have to look at the whole structure of the police administration and to consider the matter in that light. Quite apart from that, a magistrate with very considerable experience has stated in his affidavit that he formed the view that

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[3] 19 L.J.Ex. 115, 118.

[4] (1899) 63 J.P. 473.

[5] 19 L.J.Ex. 115.

£2 2s. was a reasonable contribution to the costs. Further, although he does not say so in his affidavit, he must in his position and with his experience have known that at any rate there were certain disbursements which must have been paid, fees paid on the laying of the information, fees for service, and matters of that sort. In my judgment, it has not been shown that £2 2s. in these circumstances is such a sum as could not represent costs properly incurred.

That is really an end of this case, but I would like to say this, and I should have said it earlier: It has been conceded that, although the information was laid by a particular police constable, he must be taken in laying that information to be acting on behalf of the Metropolitan Police; it would be quite artificial to treat him as a private individual and to say that as a private individual he had been put to no expense or loss or trouble because he himself was being paid all the time. Not only would that be an artificial approach, but if one looks at section 17 (1) of the Act of 1952, it is expressly provided: " 'Prosecutor' includes any person who appears to the court to be a person at whose instance the prosecution has been instituted, or under whose conduct the prosecution is at any time carried on." Accordingly, Mr. Miskin, quite rightly, has conceded that the prosecutor here and the person entitled to costs, if costs be payable, is the Commissioner of Metropolitan Police or the Metropolitan Police Force. Accordingly, in my judgment, this application fails.

CASSELS J. I agree.

ASHWORTH J. I also agree.

Application dismissed.

Solicitors: *Amery-Parkes & Co.; Treasury Solicitor.*

J. F. L.

OLDFIELD *v.* NATIONAL ASSISTANCE BOARD.

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Feb. 4.

Lord Parker C.J., Cassels and Ashworth JJ.

Bastardy—Affiliation order—National assistance—Order by consent on payment of lump sum by defendant without weekly payments—Subsequent application by National Assistance Board against defendant—Whether previous adjudication " affiliation order "—Whether " in force "—National Assistance Act, 1948 (11 & 12 *Geo.* 6, *c.* 29), *s.* 44 (2).

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Meaning of "affiliation order"—Affiliation Orders Act, 1914 (4 *&* 5 *Geo.* 5, *c.* 6), *s.* 7—*Affiliation Proceedings Act,* 1957 (5 *&* 6 *Eliz.* 2, *c.* 55), *s.* 4 (2).

On November 12, 1956, on the hearing of a complaint under section 3 of the Bastardy Laws Amendment Act, 1872, by a mother alleging that the defendant was the father of her illegitimate child, the justices were informed that the parties had consented to an order being made in favour of the mother on terms that the defendant should pay her £100, and that an order should be made without weekly payments. The justices accordingly adjudged the defendant to be the father of the child and made an order stating "No weekly "payment." The defendant duly paid the £100 to the mother with the intention that that payment should release him from all further liability to maintain the child. On January 19, 1959, and other days, assistance was given under Part II of the National Assistance Act, 1948, by reference to the requirements of the child, and on February 7, 1959, the National Assistance Board applied, pursuant to section 44 (2) [1] of that Act, for a summons to be served on the defendant under section 3 of the Bastardy Laws Amendment Act, 1872. The defendant contended, inter alia, that the order made on November 12, 1956, in the proceedings between the mother and himself was an "affiliation order" within section 44 (2) which barred the subsequent proceedings by the board. The justices considered that they had jurisdiction to hear the board's complaint, and they adjudged the defendant to be the father of the child and ordered him to pay 25s. weekly. On appeal:—

Held, that on the true construction of section 44 (2) of the National Assistance Act, 1948, the words "affiliation order" meant an order which provided for the payment of money and did not include an order such as that made by the justices on November 12, 1956, which was a mere adjudication of the defendant as the putative father; accordingly, there was no affiliation order within the meaning of section 44 (2) in force, and the justices had jurisdiction to hear the complaint of the board.

CASE STATED by Lancashire justices sitting at Lytham.

On February 7, 1959, a complaint was preferred by the National Assistance Board against the defendant, James Terence Oldfield, stating that he was the father of an illegitimate child born on May 11, 1956, to a certain woman, and that, assistance having been given under Part II of the National Assistance Act, 1948, on January 19 and other days by reference to the requirements of the child, pursuant to section 44 (2) of the Act they applied for a summons to be served upon him under section 3 of the Bastardy Laws Amendment Act, 1872.

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[1] National Assistance Act, 1948, s. 44: "(1) . . . where (*a*) assist-"ance is given under Part II of this "Act by reference to the requirements "of an illegitimate child . . . (2) If "no affiliation order is in force, the "Board . . . may . . . make applica-"tion to a court of summary jurisdic-"tion . . . for a summons to be served "under section 3 of the Bastardy "Laws Amendment Act, 1872."

Note. The Bastardy Laws Amendment Act, 1872, was repealed by the Affiliation Proceedings Act, 1957, s. 12 (1) and Sched., and by s. 12 (3): "So much of any enactment or docu-"ment as refers . . . to any enact-"ment repealed by this Act shall . . . "be construed as referring to this "Act or the corresponding enactment "therein. . . ."

In accordance with section 12 (3) of the Affiliation Proceedings Act, 1957, the justices treated the application as an application for a summons under section 1 of that Act, and found the following facts. On May 11, 1956, the mother gave birth to the female child in question. On November 12 justices sitting at Lytham heard a complaint by the mother under section 3 of the Bastardy Laws Amendment Act, 1872, at which hearing counsel for the defendant stated that the parties had consented to an order being made in favour of the mother in terms that the defendant should pay to her £100, and that an order should be made without weekly payment. As a consequence of that statement, the justices adjudged the defendant to be the putative father of the child, and their decision was shown in the minute of adjudication in the certified extract from the court register, exhibited to the case, as "Order made. No weekly payment. 10s. 6d. court costs." The notes of evidence taken by the clerk to the justices at the time read: " . . . Child born 11.5.56 single woman . . . defendant "father. Ask for order without payment for £100. Counsel agrees "no corroboration required. Order by consent. Order that "defendant is father of the child. No money payment to be "made." The defendant paid £100 to the mother on November 12, 1956, with the intention that that payment should release him from all further liability to maintain the child. The justices found, further, that assistance was given by the board by reference to the requirements of the child on January 19, 1959, and other days, and that the defendant was the putative father of the child (the evidence of the mother having been corroborated in a material particular by other evidence to the satisfaction of the justices).

It was contended by the defendant that the previous proceedings pursuant to section 3 of the Bastardy Laws Amendment Act, 1872, between the mother and him, and the order made thereon by the justices on November 12, 1956, barred the subsequent proceedings, there being an affiliation order in force within the intent of section 44 (2) of the National Assistance Act, 1948; that that order was an order made on a complaint pursuant to the Act of 1872, and the justices' jurisdiction in such proceedings to make an order (as opposed to a finding of paternity) was a jurisdiction to make an affiliation order within that Act, and whether or not the order that they in fact made was such an affiliation order, they did not thereafter have jurisdiction to deny that it was such an order or to vary, interpret or otherwise reconsider its effect as being other than an affiliation order within the intent of section 44 (2) of the Act of 1948; that, by virtue of the decision in *Williams* v. *Davies*,[2] the justices might not adjudicate a second time as to the paternity of the child at the suit of the board, having previously done so at the suit of the mother; and that, therefore, the justices should not make the order sought by the board.

It was contended by the board that the words "affiliation "order" in section 44 (2) of the National Assistance Act, 1948, referred to an order made under the Affiliation Proceedings Act, 1957 (or the Bastardy Laws Amendment Act, 1872), requiring the person against whom an adjudication of paternity had been made to pay (i) a sum of money weekly for the maintenance and education of the child; or (ii) a sum in respect of the expenses incidental to the birth of the child; or (iii) the child's funeral expenses in the case where the child had died before the making of the order; that the justices had jurisdiction to hear and determine the complaint and, in particular, to make an adjudication of paternity followed by such order referred to in section 4 (2) of the Affiliation Proceedings Act, 1957, as they might think fit in all the circumstances of the case; that the order made on November 12, 1956, did not exhaust the jurisdiction of a justices' court under section 44 (2) of the National Assistance Act, 1948, as regards the board, who were not a party to the previous proceedings and whose right to apply for an order under the Affiliation Proceedings Act, 1957, was separate and distinct and not coextensive with any right enabling the mother to institute affiliation proceedings; that the fact that a justices' court had made a previous adjudication of paternity against the defendant in respect of the child upon complaint made by the mother did not preclude the justices from making a second adjudication against him in respect of the child in proceedings by the board under section 44 (2) of the National Assistance Act, 1948; that the effect of the previous adjudication of paternity made on the mother's complaint irrevocably determined the status of the defendant in relation to the child so that the justices must on hearing evidence in accordance with the provisions of section 4 of the Affiliation

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[2] (1883) 11 Q.B.D. 74.

Proceedings Act, 1957, adjudge him to be the putative father of the child; that the defendant was estopped by reason of the prior adjudication from denying that he was the putative father of the child; and that, even if the justices disregarded altogether the evidence tendered by the board as to the proceedings of November 12, 1956, and the adjudication made thereon, there was other evidence in support of the complaint which was sufficient in law to justify an adjudication of paternity against the defendant.

The justices were of the opinion that no affiliation order was in force within the meaning of those words in section 44 (2) of the National Assistance Act, 1948, by reason of the wording of section 4 of the Bastardy Laws Amendment Act, 1872 (the relevant statute in force on November 12, 1956), which conferred jurisdiction on them to adjudicate on the paternity and, if they saw fit, to make an order for payment of a weekly sum and certain expenses; that the award of costs on November 12, 1956, was made under section 55 of the Magistrates' Courts Act, 1952, the Sixth Schedule of which repealed that part of section 4 of the Bastardy Laws Amendment Act, 1872, which, prior to June 1, 1953, had contained the power to award such costs, and this, in their opinion, did not affect the question of whether an affiliation order was in force; that the board was not bound by *Williams* v. *Davies*[2] because in that case the facts were that an order for weekly payments had been made in the first instance by the justices and it was only on the making of a second order for weekly payments that the justices were held to be wrong, whereas in this case they were of opinion that no affiliation order was in force so that the decision in *Williams* v. *Davies*[2] did not apply; and that the defendant was the father of the child. They accordingly ordered that he should pay the weekly sum of 25s. to the board until she should attain the age of 16.

The defendant appealed.

David Wild for the appellant. The order made by the justices on November 12, 1956, was an "affiliation order" within the meaning of section 44 (2) of the National Assistance Act, 1948, and, therefore, it barred the subsequent proceedings. It is true that section 7 of the Affiliation Orders Act, 1914, defines "affiliation order" as an order made under the Bastardy Laws Amendment Act, 1872, or any amending Act, "adjudging a man

[2] 11 Q.B.D. 74.

"to be the putative father of a bastard child and ordering him "to pay a sum of money," but, apart from that definition, which is expressed to be for the purposes of that Act, there has never been any statutory definition or judicial construction of the words, and they must, therefore, be given their ordinary and natural meaning. The ordinary and natural meaning of the words "affiliation order" is not an order relating to the payment of money but one which in some way makes a finding of paternity with regard to an illegitimate child. The court is not here concerned with the Act of 1914, which was purely financial in its provisions, but with section 44 of the National Assistance Act, 1948. That section 4 of the Affiliation Proceedings Act, 1957, a consolidation Act, in re-enacting section 4 of the Act of 1872, imports the financial element introduced by section 7 of the Act of 1914 is an indication that in 1948 there was no such element. The essence of an affiliation order under the Act of 1872, and the National Assistance Act, 1948, is a finding of paternity: *Colchester* v. *Peck*,[3] *per* Lord Hewart C.J.[4] Section 4 of the Act of 1872 (and section 4 (2) of the Act of 1957) provided that the court may adjudge the defendant to be the putative father, and "may also, if it thinks fit in all the circumstances "of the case, proceed to make against him an order" for the payment of money. The justices, therefore, having made an adjudication of paternity, must consider whether in all the circumstances they ought to make an order for payments of money; any agreement between the parties, as there was here, is a circumstance to be taken into consideration, and if justices do take it into consideration and decide to make no order for the payment of money, but only an order adjudging the defendant to be the father of the child, that is an affiliation order. The omission to order weekly payments cannot make any difference to the nature of the order.

The Act of 1948 envisages that a case should be proved in toto on an application by the board under section 44. If an affiliation order is not an adjudication as to paternity but is to be construed as limited to an order relating to the payment of money, it would be open to a defendant in circumstances such as these to contest the issue of paternity a second time, and there would be the possibility of conflicting decisions on that issue. If the order of November 12, 1956, was not an affiliation order, there is no other kind of order which it could be; yet it was one which the justices had power to make.

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[3] [1926] 2 K.B. 366; 42 T.L.R. 535.

[4] [1926] 2 K.B. 366, 369.

J. R. Cumming-Bruce for the board. Proceedings under section 44 of the National Assistance Act, 1948, are quite different in their character and incidence from proceedings brought at the instance of a mother: see the line of authority culminating in *Stopher* v. *National Assistance Board.*[5]

Section 4 of the Bastardy Laws Amendment Act, 1872, envisaged two stages in the making of an order: first, the adjudication of the defendant to be the putative father of the child, and then, the second stage, the justices might proceed, if they thought fit, to make an order that he pay a sum of money weekly. In this case, in November, 1956, the justices made an adjudication of paternity in the first stage, but they never proceeded to the second stage, the consideration of whether they should also make an order for the payment of money, because the agreement between the parties rendered such an order unnecessary. So, however they may have described their order, they were not asked to make, and did not in fact make, an affiliation order within the meaning of the legislation on the matter.

Section 4 (2) of the consolidation Act of 1957, in re-enacting the law as it was under the Act of 1872, also sets out the two stages in the making of an order, and the reference to "affiliation "order" in the context of an order for payment shows that the concept of an affiliation order as an order relating to payments was not a departure from the existing law. That reference and the definition in section 7 of the Act of 1914 merely give expression to the natural meaning of the words.

The adjudication of paternity, therefore, is a mere condition precedent to the making of an affiliation order; and the words "If "no affiliation order is in force" in section 44 (2) of the National Assistance Act, 1948, are apt only to describe the position when justices, having made an adjudication as to paternity, have proceeded to make an order for the payment of money. Were that not so, it would be difficult to see any relevance in the words "in force." Since they govern the rights of the board to recover money from the defendant, those words can only be relevant if they relate to a financial order. See also the references to "payments thereunder" in subsections (4), (5), (6) and (8) of section 44, providing for variation of an affiliation order so that payment may be made to the board. The construction advanced for the board is consistent with a carefully built up system of relief, and the court should be reluctant to adopt a construction giving a less satisfactory system.

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[5] [1955] 1 Q.B. 486; [1955] 2 W.L.R. 622; [1955] 1 All E.R. 700.

Wild in reply. Although the words "affiliation order" may be apt to include the whole of the order made, an order is not the less an affiliation order if the justices, in the exercise of their discretion, have not inserted any provision for the payment of money. The system of the Act of 1948 is that if the mother has taken no steps to obtain maintenance the board, in certain circumstances, may do so, but it is for the board to prove the whole case in the same way as the mother would have. If an affiliation order providing for payments is in force, the board may ask for the payments to be made to it, but the board has no right to ask for additional payments or for a larger sum than that ordered to be paid to the mother. There is no obligation on justices to order any payments, and if, as here, they have decided that no payments should be made, that decision is binding on the board.

LORD PARKER C.J. This is an appeal by way of case stated by justices for the county of Lancaster sitting at Lytham, before whom a complaint was preferred by the National Assistance Board against the defendant, alleging that he was the father of a certain illegitimate child.

The justices heard the complaint. They heard evidence on the part of the mother, and they heard the evidence of the defendant, who contested the issue. They found, and the finding as such is not challenged, that the defendant was the father of the child, and they ordered that he should pay the weekly sum of 25s. to the board direct until the child should attain the age of 16 years. It is said that the justices were wrong, for reasons to which I will refer in a moment.

The powers of the National Assistance Board in this regard are to be found in section 44 of the National Assistance Act, 1948. Speaking quite generally for the moment, where assistance has been given under the Act by reference to the requirements of an illegitimate child, the board have power to make the putative father pay towards the requirements of that child. If I may go in reverse order and refer to subsection (6) of that section first, power is there given to apply to the court for an order which has already been made to be varied so that, instead of the money being paid by the putative father to the mother, it shall be paid direct to the board. Under subsection (5) power is given to intervene

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in any proceedings brought by the mother in order to provide that any payments she would otherwise receive are paid direct to the board, and under the group of subsections (2), (3) and (4) power is given to the board themselves to take proceedings against a man, alleging that he is the putative father, and to obtain the order which the mother might have obtained. Subsection (2), which is the important subsection for the purposes of this case, reads as follows: "If no affiliation order is in force, the board or local "authority may within three years from the time when the "assistance was given or accommodation provided make application to a court of summary jurisdiction having jurisdiction in "the place where the mother of the child resides for a summons "to be served under section 3 of the Bastardy Laws Amendment Act, 1872." The opening words are "If no affiliation "order is in force," and the sole issue with which the court is now concerned is as to the meaning of the two words "affiliation "order" in that subsection.

That issue arises for this reason: On November 12, 1956, a long time before the present complaint, an application was made by the mother under section 3 of the Bastardy Laws Amendment Act, 1872, and the justices adjudged that the defendant was the father of her child. In fact the defendant was prepared to pay £100, and the mother was prepared to accept it, and it appears that the justices, having been told that, merely adjudged that the defendant was the father of the child, and made no order for any money payment other than the court costs of 10s. 6d. In fact the defendant thereafter paid the mother the £100, and the question is whether the order the justices so made on November 12, 1956, was an affiliation order. If it was, then the National Assistance Board have no power under section 44 to obtain the order which the justices made on March 16, 1959, with which the court is now concerned.

It is convenient to look first at section 4 of the Bastardy Laws Amendment Act, 1872. I will not read it all, but it is enough to say that, upon certain evidence being given and the justices being satisfied, they may adjudge the defendant to be the putative father of the bastard child. That is the first step, and then the section goes on: "and they may also, if they see fit, having "regard to all the circumstances of the case, proceed to make an "order on the putative father for the payment to the mother. . . ." Pausing there, two steps are envisaged, the first the adjudication that the man is the putative father, and secondly, if the justices think fit, an order for the payment of money.

By section 7 of the Affiliation Orders Act, 1914, there was a definition of "affiliation order"—true, for the purposes of that Act. It provides: "In this Act, unless the context otherwise "requires, the expression 'affiliation order' means an order made "under the Bastardy Laws Amendment Act, 1872, or any Act "amending the same, adjudging a man to be the putative father "of a bastard child and ordering him to pay a sum of money "weekly or otherwise to the mother . . ." Finally, the Affiliation Proceedings Act, 1957, which is a consolidating Act made under the Consolidation of Enactments (Procedure) Act, 1949, provided by section 4 (2): "If the evidence of the mother is corroborated "in some material particular by other evidence to the court's "satisfaction, the court may adjudge the defendant to be the "putative father of the child and may also, if it thinks fit in all "the circumstances of the case, proceed to make against him an "order (referred to in this Act as 'an affiliation order') for the "payment by him" of money and expenses and the like.

In all those three Acts the words used are a little different. There was no definition in the Act of 1872, but it was contemplated that there should be, as it were, two stages, an adjudication and then what is called an order for the payment of money. In the Act of 1914 the adjudication and the order for the payment of money are together treated as the affiliation order, and in the Affiliation Proceedings Act, 1957, the order for the payment of money alone is treated as the affiliation order. However, it is significant that under all three statutes, adjudication alone is not an order. That being so, the next step is to look at the context in which these words are used. Section 44 of the National Assistance Act, 1948, is a financial section providing, as I have said, for the collecting of money by the National Assistance Board. One would think that "affiliation order" in such a section must mean an order which was more than a mere adjudication of a man as the putative father, but one which provided for the payment of money. The words "is in force," in my judgment, assist that contention. Otherwise, it would be easy to say that the board might make an application for a summons to be served under section 3 of the Act of 1872 against any man who had not been adjudged to be the putative father. That is not, however, the scheme; the scheme is that an application can be made if no affiliation order is in force, and by that I think is meant no order for the payment of money. The structure of section 44 would seem to bear that out, and for that reason, Lord Parker C.J.

coupled with the significance which I attach to the fact that in each of the three Acts to which I have referred adjudication alone is nowhere treated as an order, I think that "affiliation order" in subsection (2) of section 44 is confined to an order for the payment of money. In the present case there was no order for the payment of money made in 1956. Accordingly, an application did lie under section 44 (2). That application was heard by the justices; they dealt with all the evidence, as they had to pursuant to section 44 (3), and they adjudged that the defendant was the father of the child and ordered him to pay 25s. a week to the board. In my judgment, the justices were right, and this appeal should be dismissed.

CASSELS J. I agree.

ASHWORTH J. I also agree.

Appeal dismissed.

Solicitors: *Bower, Cotton & Bower for George Davies & Co., Manchester; Solicitor, National Assistance Board.*

J. F. L.

MOUNSDON AND ANOTHER v. WEYMOUTH AND MELCOMBE REGIS BOROUGH COUNCIL.

1960
Jan. 20, 21;
Feb. 2.

Lord Parker C.J., Cassels and Ashworth JJ.

Town and Country Planning—Enforcement notice—Justices' jurisdiction—Question whether permission to develop necessary—Limited permission already given—Town and Country Planning Act, 1947 (10 & 11 *Geo.* 6, *c.* 51), *s.* 23 (4) (*a*).

Town and Country Planning—Development—Planning permission—Whether appellants estopped from contending that there has been no development by reason of prior application for and grant of planning permission—Town and Country Planning Act, 1947, *s.* 23.

On August 30, 1958, the respondents, as the local planning authority, issued enforcement notices under the provisions of section 23 of the Town and Country Planning Act, 1947, in respect of land which the appellants on April 9, 1952, had obtained planning permission to use as a caravan site subject to certain conditions under which the number of caravans was limited to three. In

[Reported by Miss EIRA CARYL-THOMAS, Barrister-at-Law.]

July, 1954, there were 14 caravans on the land; in July, 1958, the number had risen to 26. It was alleged in the enforcement notices that development of the land consisting of a material change in the use thereof by using it as a site for caravans exceeding three in number had been carried out within the four years preceding the date of the notice, which change of use constituted development within the meaning of the Act, that the conditions set out in the notice of permission to develop dated April 9, 1952, had not been complied with inasmuch as the land had been used for siting more than three caravans, and requiring the appellants to discontinue the use of the land as a site for caravans. On September 25, 1958, the appellants applied to the justices to set aside the notices dated August 30, 1958, contending that they had an "established user" of the land for siting caravans as at July 1, 1948, and therefore did not require planning permission; their application was dismissed. On appeal:—

Held, allowing the appeal, (1) that on an application to set aside an enforcement notice alleging non-compliance with conditions on which permission to develop was granted, it was open to the justices to quash the notice if satisfied of any of the three grounds set out in section 23 (4) (*a*) of the Town and Country Planning Act, 1947 [1] (post, p. 655).

Dicta of Lord Evershed M.R. in *Eastbourne Corporation* v. *Fortes Ice Cream Parlour (1955) Ltd.* [1959] 2 Q.B. 92, 106–107; [1959] 2 W.L.R. 630; [1959] 2 All E.R. 102 applied.

(2) That the appellants were not precluded from raising the issue as to whether there had been development by reason of the prior application for and grant of planning permission (post, p. 656).

Swallow and Pearson v. *Middlesex County Council* [1953] 1 W.L.R. 422; [1953] 1 All E.R. 580 applied.

(3) That, in the circumstances, the development alleged to have been carried out within the period of four years preceding the notices had not been established; accordingly, the enforcement notices should be set aside.

CASE STATED by Weymouth and Melcombe Regis justices.

On September 25, 1958, complaints were preferred by the appellants, Mr. and Mrs. Mounsdon, against enforcement notices dated August 30, 1958, issued by the respondents, the Weymouth and Melcombe Regis Borough Council, under the provisions of section 23 of the Town and Country Planning Act, 1947; the complaints were heard on November 18, 1958, and December 1, 1958, and the decision of the justices was given on December 12, 1958.

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[1] Town and Country Planning Act, 1947, s. 23: " . . . (4) If any person "on whom an enforcement notice is "served under this section is "aggrieved by the notice, he may . . . "appeal against the notice to a court "of summary jurisdiction for the "petty sessional division or place "within which the land to which the "notice relates is situated; and on "any such appeal the court—(*a*) "if satisfied that permission was "granted under this Part of this Act "for the development to which the "notice relates, or that no such per-"mission was required in respect "thereof, or, as the case may be, "that the conditions subject to which "such permission was granted have "been complied with, shall quash "the notice to which the appeal "relates; . . ."

The following were among the facts found by the justices:

The land referred to in the notices was ·37 of an acre in extent. There were two caravans placed on it during the winter of 1945/46, and in the summer of 1946 there were three caravans on the land. During the winter of 1946/47 there were 18 caravans on the land; during the summer of 1947 six of these remained, and the remainder were moved to caravan sites elsewhere. At the end of the summer of 1947 the appellants placed a further 15 caravans on the land, making a total of 21 caravans, and these 21 caravans remained unoccupied on the land throughout the winter; on July 1, 1948, eight of these caravans remained on the land and were let for occupation by holiday-makers. On or about June 26, 1951, an enforcement notice was served by the respondents on the appellants ordering them to cease to use the land as a camping site and for stationing or storing caravans. An appeal against this enforcement notice was lodged and set down for hearing on October 23, 1951. The solicitor for the appellants asked for an adjournment pending an application being made for planning permission, and the appeal was withdrawn in April, 1952. On April 9, 1952, a notice of the grant of planning permission was issued by the Weymouth Town Council acting for and on behalf of the Dorset County Council, being the local planning authority, addressed to "Mrs. Mounsdon," imposing conditions (inter alia) that not more than three caravans should be sited on the land. No appeal was lodged against the conditions contained in this grant of planning permission.

It was contended by the appellants that they had an "established user" of the land for siting caravans as at July 1, 1948, and required no planning permission to continue to use the land for that purpose, and that the enforcement notice ought to be quashed under section 23 (4) (*a*) of the Act of 1947; that the enforcement notice must be construed strictly, and against the council where ambiguous; that the number of caravans was first increased above three before July 1, 1948, and was not therefore development within section 12 of the Town and Country Planning Act, 1947, and the notice should be quashed. Alternatively, it was contended that the enforcement notice was

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ineffective in so far as it related to breaches of condition outside a period of four years before service, and ought to be varied so as to direct the appellants to discontinue the use of the land as a site for caravans exceeding 14 in number; and the proper construction of the planning permission of April 9, 1952, was that the permission had reference only to the use of the land as a camping site during the period between Easter and September 30 in any year, and that the enforcement notice ought to be varied so as to be applicable only to such period in each year.

It was contended by the respondents that the appellants had not appealed against or objected to the planning permission of April 9, 1952; that the increase in the number of caravans amounted to material change of use, and hence to development as defined by section 12 (2) of the Act of 1947; that the justices must accept the statement in the enforcement notice that development had taken place, and could not inquire into the facts relating to the alleged change of use to decide whether or not it constituted development; that the period of 28 days in every year during which the General Development Order, 1950, permitted land to be used for certain purposes without planning permission had been greatly exceeded; that the enforcement notice might require more to be done than was necessary having regard to the requirement as to the period within which a notice must be served under section 23 (1) of the Act of 1947.

The justices decided that permission was granted as shown in the notice of permission dated April 9, 1952, and in the enforcement notice for not more than three caravans to be sited on the land; that permission was required in respect of any further development, and that such permission had not been granted. They accordingly dismissed the complaints.

Michael Albery Q.C. and *Ingram Poole* for the appellants. The appellants have an "established user" of the land as a caravan site, and at no time since the Town and Country Planning Act, 1947, came into force (and certainly not within the four years preceding the notice) has there been anything amounting to a material change of user. At the time of the justices' decision the Court of Appeal had not heard the appeal in *Eastbourne Corporation* v. *Fortes Ice Cream Parlour (1955) Ltd.*[2] (when it was held that it was open to justices to inquire whether or not there had been development); the law now having been declared as by the Court of Appeal (reversing the decision of this court) it becomes apparent that the justices' conclusion that the appellants required permission for their present user of the land was wrong.

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[2] [1959] 2 Q.B. 92; [1959] 2 W.L.R. 630; [1959] 2 All E.R. 102.

By section 23 (2) of the Act of 1947 there are two forms of notice which can be served: (i) alleging development without permission, or (ii) alleging breach of condition subject to which permission was granted. It is submitted that where lack of permission is alleged, the first or second grounds in section 23 (4) (*a*) on which the court has power to quash a notice can apply; where breach of condition is alleged, the second or third grounds can apply. The second ground (on which reliance is placed by the appellants) is that "no . . . permission was required in respect "thereof" ("in respect thereof" referring back to the development to which the notice relates). On the authority of the *Eastbourne* case,[2] if there is no development, that condition is satisfied. The appellants contend that no permission was required because in fact there was no development. They are not estopped from waiving the permission which they applied for and which was granted in 1952; permission is something given for the benefit of the subject, and does not preclude him from relief on an alternative title if he has one. [Reference was made to the *Eastbourne* case[2]; *Guildford Rural District Council* v. *Fortescue*[3]; and to *Pyx Granite Co. Ltd.* v. *Ministry of Housing and Local Government*.[4]]

The appellants are only concerned to say that the development alleged in the enforcement notice has not taken place. The development alleged is not user of 26 caravans but of more than three. Since there were 14 caravans on the site in July, 1954, no material change of user during the last four years has been alleged. The enforcement notice should be quashed under section 23 (4) (*a*); alternatively, it should be varied.

John Stuart Daniel for the respondents. Clearly on the authorities it was open to the justices to inquire whether the development alleged had taken place, and on their findings it had taken place more than four years before the notice. But this notice alleges breach of a condition. On the justices' findings permission was granted with a condition attached, which condition was broken, and the justices must have been satisfied that it was broken. That being so, they cannot have been satisfied in the opposite sense, which is the only ground in the section upon which in the case of such a notice they could have quashed it. Reliance is placed on the wording of the section.

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[2] [1959] 2 Q.B. 92.

[3] [1959] 2 Q.B. 112; [1959] 2 W.L.R. 643; [1959] 2 All E.R. 111.

[4] [1960] A.C. 260; [1959] 3 W.L.R. 346; [1959] 3 All E.R. 1 (H.L.).

There is a clear distinction in section 23 between a case in which no permission was sought or granted and one in which a conditional permission was granted. The first two grounds of section 23 (4) (*a*) apply and are clearly intended to apply solely and exclusively to cases where it is alleged that development that required permission has been carried out without permission, and that the third ground applies solely and exclusively to cases where breach of condition is alleged, and it is only that ground which is intended to be available to an appellant who seeks to quash a notice which is concerned with breach of condition. Reliance is placed on the words "as the case may be" as emphasising the distinction between absence of permission and conditional permission. It is not further or alternatively, but a pure alternative.

It is clear from the cases that the defences against an enforcement notice are by no means exhausted by the provisions of section 23. [Reference was made to *Mead* v. *Chelmsford Rural District Council.*[5]]

When the appellants applied for permission in 1952 they thought that they were in risk, and were content to clarify the matter by applying for and getting permission. Thus they put themselves within the planning net and became subject to the conditions which were attached to the permission. *Swallow and Pearson* v. *Middlesex County Council*[6] is distinguishable on the ground that planning permission was not obtained in that case. [Reference was made to section 75 of the Act of 1947.] On the facts as found by the justices it is not clear that permission was not required. The onus is on the appellants, and they cannot say that they must have satisfied the justices that permission was not required.

Albery Q.C. replied.

Cur. adv. vult.

February 2. Ashworth J. delivered the judgment of the court: This is an appeal by way of case stated from a decision of justices for the borough of Weymouth and Melcombe Regis dismissing complaints preferred by the appellants for the purpose of setting aside enforcement notices issued by the respondents under the provisions of section 23 of the Town and Country Planning Act, 1947.

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[5] [1953] 1 Q.B. 32; [1952] 2 T.L.R. 700; [1952] 2 All E.R. 723.

[6] [1953] 1 W.L.R. 422; [1953] 1 All E.R. 580.

The piece of land with which the case is concerned is situate in the borough of Weymouth and is a little over one-third of an acre in extent. In the winter of 1945/46 two caravans were placed on the land and thereafter the number of caravans increased, though it varied as between winter and summer. On July 1, 1948, the number was eight, such caravans being let for occupation by holiday-makers. In June, 1951, the respondents issued enforcement notices requiring the appellants to cease to use the land as a camping site; proceedings by the appellants for the purpose of setting aside these notices were withdrawn in April, 1952, as the appellants had meanwhile applied for and obtained planning permission to use the land as a caravan site, subject to certain conditions under which the number of caravans was limited to three, and the period during which the land might be used as a camping site was limited to the period between Easter and September 30 in each year.

The appellants did not observe these conditions. In August, 1952, there were 11 caravans on the land, in August, 1953, there were 13, and in July, 1954, there were 14. In July, 1958, the number of caravans had risen to 26. On August 30, 1958, the respondents issued the enforcement notices now in question. In the first recital of these notices it was alleged that development of the land in question "consisting of the making of a material "change in the use thereof by using the same as a site for "caravans exceeding three in number has been carried out within "the four years preceding the date of this notice." The second recital was in these terms: "Whereas the aforementioned change "of use constitutes development within the meaning of the Act "and the conditions set out in a notice of permission to develop "land granted in respect of the said land and dated April 9, 1952, "under the provisions of Part III of the Act have not been "complied with inasmuch as the land to which the permission "relates has been used for siting more than three caravans." The notices then required the appellants to discontinue the use of the said land as a site for caravans exceeding three in number and to remove all the caravans exceeding three in number from the land within seven days from the expiration of 28 days after service of the notices.

On September 25, 1958, the appellants preferred complaints with the object of setting aside the notices dated August 30, 1958, and these complaints were dismissed on December 12, 1958. It is only fair to the justices who heard the complaints to state that at that time the Court of Appeal had not heard the appeals in *Eastbourne Corporation* v. *Fortes Ice Cream Parlour (1955) Ltd.*[1] and *Guildford Rural District Council* v. *Fortescue.*[2] The decision of this court in the first of these cases (which was subsequently reversed by the Court of Appeal) was cited to the justices and was duly regarded by them as binding.

On the hearing of the present appeal the main issue between the parties raised the following problem: If a local planning authority serves on a person an enforcement notice alleging a breach of the conditions subject to which permission to carry out development was granted, is it open to that person in proceedings under section 23 (4) to contend that permission was not required and that there has been no development?

It is, in our view, clear from the decisions of the Court of Appeal in the cases already cited that if an enforcement notice merely contains an allegation that development has been carried out without permission, it is open to the person aggrieved by the notice to contend that no development within the meaning of section 12 has taken place. Although the problem raised by the present appeal might, as it seems to us, have been brought before the courts in the *Guildford* case,[2] since a limited permission was in fact granted in that case, there is no direct reference to it in the judgments of the Court of Appeal.

It was contended for the respondents that throughout section 23 there is to be found a clear distinction between a case in which no permission was sought or granted and a case in which a conditional permission was granted. Thus, by subsection (1) a planning authority is given power to serve an enforcement notice in either of two situations: (a) if development has been carried out without the grant of permission required in that behalf, or (b) if any conditions subject to which such permission was granted in respect of any development have not been complied with. By subsection (2) the notice is to specify the development alleged to have been carried out without such permission or, as the case may be, the matters in respect of which it is alleged that any such conditions have not been complied with. By subsection (4) (*a*) a court is directed to quash the notice if satisfied (i) that permission was granted for the development to which the notice relates, or (ii) that no such permission was required in respect thereof, or (iii) as the case may be, that the conditions subject to which such permission was granted have been complied with. By paragraph (*b*) a court is directed to vary the notice if, though not satisfied under paragraph (*a*), it is nonetheless satisfied that the requirements of the notice exceed what is necessary for restoring the land to its condition before the development took place or for securing compliance with the conditions, as the case may be.

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[1] [1959] 2 Q.B. 92; [1959] 2 W.L.R. 630; [1959] 2 All E.R. 102.

[2] [1959] 2 Q.B. 112; [1959] 2 W.L.R. 643; [1959] 2 All E.R. 111.

It is to be observed that the phrase "as the case may be" appears in subsection (2) and in paragraphs (*a*) and (*b*) of subsection (4). This phrase was relied on by counsel for the respondents as emphasising and so to speak maintaining the distinction drawn in subsection (1) between absence of permission and conditional permission. Accordingly, he says, when paragraph (*a*) of subsection (4) is considered, the first two grounds are appropriate to a case in which absence of permission is alleged, whereas the third ground, prefaced by the words "as the case "may be," is appropriate to a case in which non-compliance with conditions is alleged.

The respondents' argument, however, involves one further step, namely, that the distinction between the first two grounds in paragraph (*a*) of subsection (4) and the third ground is a distinction for all purposes. That is to say, a person aggrieved by a notice alleging non-compliance with a conditional permission is limited to the third ground if he seeks to have the notice quashed.

While we accept the argument that in section 23 a distinction is drawn between absence of permission and conditional permission, we are unable as a matter of construction to interpret paragraph (*a*) of subsection (4) as both drawing a distinction and imposing a limitation. The phrase "as the case may be" seems to us to have been inserted for the purpose of clarification and not for the purposes of restricting a court's right to quash a notice alleging non-compliance with conditions. An essential element in an enforcement notice is that development should have taken place, and, in our view, if an aggrieved person is to be precluded from challenging this point in the case of a notice alleging non-compliance with conditions on which permission to develop was granted, clearer provisions are required than those contained in paragraph (*a*) of subsection (4). Before the decision of the Court of Appeal in the two cases already cited, it was open to a planning authority to argue that an aggrieved person could not challenge the allegation of development, whichever of the three grounds mentioned in paragraph (*a*) was relied on by him for the purpose of setting aside the notice. Such an argument can no longer be put forward when either of the first two grounds is relied on and, in our view, to allow it to be raised when the third ground is relied on involves a result so much at variance with what appears to be the general sense of the section that we should avoid it unless clearly compelled otherwise.

This conclusion appears to us to be in accord with the reasoning of the Court of Appeal. In the *Eastbourne* case[3] Lord Evershed M.R. said: "I return to the vital language of section 23 "(4) of the Act of 1947; and, in my judgment, much assist-"ance towards a proper solution is to be found in the last "seven words, '. . . the development to which the notice relates.' "For properly expounded by reference to the earlier subsections "(1) and (2), these words must, in my view, mean (and I am "again indebted to Mr. Megarry in the *Guildford* case[4]) 'the "'development which is alleged to have been carried out without "'the grant of permission required in that behalf under this Part "'of the Act.' In my judgment, it is the use of the word "'alleged' derived from subsection (2) that provides the all-"important clue. It is, as I think, an essential requirement of "the enforcement notice that it should *allege* development carried "out without permission; and I can see no compelling reason for "holding that the only subject of the 'allegation' is the absence "of permission, the development itself (that is, the requirement) "being assumed. On the contrary, it appears to me more natural "to treat the allegation as being, as it were, a double allegation—"an allegation both of the development (requiring permission) "having been carried out and of the absence of permission; and, "if so, that the justices' powers conferred by the formula in "question involve inquiry whether no permission under Part III "of the Act was required on the ground that there had been in "fact no development either after 1948 or at all, no less than on "the ground that, though post-1948 development had occurred, "it was of a kind that did not require permission." And in the *Guildford* case he said[5]: "These two appeals raise precisely the "same questions, namely: first, whether the justices at Woking "had jurisdiction under the Town and Country Planning Act, "1947, to inquire into and determine whether there had in fact "been development on the land owned and occupied by the "appellants, within the meaning of section 12 of the Act; and

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[3] [1959] 2 Q.B. 92, 106–107.

[4] [1959] 2 Q.B. 112.

[5] Ibid. 123.

"second, if so, whether they were entitled to conclude, as they "did, that there had not been any development. In the circumstances, Mr. Megarry confined himself in argument to the "appeal by Mr. and Mrs. Penny, the owners of the land in "question; and this judgment is similarly confined in terms.

"The facts appear from the case stated and may be briefly "summarised as follows. The appellants, Mr. and Mrs. Penny, "are the proprietors of 1½ acres of land within the jurisdiction of "the respondents, the Guildford Rural District Council, as the "appropriate local planning authority. On July 1, 1948—the "date of the coming into operation of the Town and Country "Planning Act, 1947—the 1½ acres were being used (as they had "been before that date and as they have continued to be used "since) as a site for residential caravans. On July 1, 1948, the "number of such caravans appears to have been eight, but there-"after the number steadily increased. In 1955 and 1956 recourse "was had to the powers and jurisdiction of the local planning "authority and (on appeal) to the Minister, the result of which "was that the Minister permitted 21 caravans to be placed on the "1½ acres. The appellants, however, were not satisfied with the "scope allowed by this determination on the part of the Minister; "and it is not now in doubt that, in spite of the time and the "trouble taken, we must determine the question before us with-"out regard to what was then done."

Although, as already stated, the question was not argued in the *Guildford* case[6] whether the jurisdiction of the justices in a case where conditional permission was granted was limited to the third ground mentioned in paragraph (*a*) of subsection (4), we can hardly think that if that limitation (for which the respondents now contend) were imposed by the section, it would have passed unnoticed.

In our judgment, therefore, if an aggrieved person seeks to set aside an enforcement notice alleging non-compliance with the conditions on which permission to develop was granted, it is open to the justices to quash the notice if satisfied of any of the three grounds set out in section 23 (4) (*a*).

The respondents further contended that even if they were wrong on the major issue already considered, the appellants had "put themselves within the planning net" by applying for and obtaining permission after the enforcement notices issued in 1951. In passing, it may be noted that counsel for the respondents conceded that these notices were defective in form and of no effect. It was contended that, having obtained planning permission, the appellants could not now argue that it was unnecessary and it was suggested that *Swallow and Pearson* v. *Middlesex County Council* [7] was distinguishable on the ground that planning permission was not obtained in that case, whereas in this case it was. We do not think that the distinction affects the principle applied in that case and in others to which reference was made in the course of the argument. In our view the appellants are not precluded from raising the issue as to development by reason of the grant of planning permission in 1952.

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[6] [1959] 2 Q.B. 112.

The last point taken on behalf of the respondents was that on the facts the appellants had not done enough to satisfy the justices that permission was not required. In this connection it is to be noted that by subsection (1) of section 23 the planning authority is limited to a period of four years after alleged development has taken place, within which an enforcement notice can be served. In the present case the enforcement notice was issued in August, 1958, and expressly referred to development alleged to have been carried out within a period of four years preceding the notice. The development complained of in the enforcement notice is an increase in the number of caravans beyond three, but as the number of caravans in 1954 was 14, the development alleged was carried out before that date. In these circumstances the alleged development was not established.

Having regard to the interpretation of the Act prevailing at the time when the justices considered this case, we can well understand how they reached their conclusion, but, in our judgment, for the reasons which we have endeavoured to state, it was wrong and, accordingly, this appeal should be allowed. The case should be sent back to them with a direction to quash the notices.

Appeal allowed with costs.

Solicitors: *Peacock & Goddard for Hollowell & Bollam, Weymouth; Sharpe, Pritchard & Co. for E. J. Jones, Town Clerk, Weymouth.*

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[7] [1953] 1 W.L.R. 422; [1953] 1 All E.R. 580.

BAKER v. MERCKEL. ANSON (THIRD PARTY).

[1958 B. No. 51.]

C. A.

1960
Feb. 2, 3,
22.

Sellers and
Pearce L.JJ.;
Havers J.

Landlord and Tenant—Option to extend term—Assignment—Whether assignor liable under lease after exercise of option by assignee—Whether original lessee liable for defaults of assignee—Effect in law of supplemental deed giving option—Doctrine of surrender and regrant on alteration of term of lease.

Landlord and Tenant—Surrender and regrant, doctrine of—Alteration in term of existing lease—Supplemental deed giving option to extend term.

Election or Option—Effect of exercise—Lease, extension of—Exercise by assignee—Liability of assignee under lease.

By a lease dated February 17, 1947, a lessor B. demised to a lessee M. a dwelling-house for a term of seven years from November 1, 1946, with the usual lessee's covenants as to rent and repair. On March 23, 1949, by a supplemental deed, the lessor agreed with the lessee that "if the tenant shall give notice in writing to the "landlord before November 1, 1952, of such his desire, the within-"written lease shall thereupon be read, construed and take effect as "though the term thereby granted was for a period of 11 years from "November 1, 1946"; and there was a variation of the covenant to paint the exterior.

On April 9, 1951, the lessee assigned the premises with the benefit of the option to a third party A.; and in October, 1951, A. assigned them to a fourth party W., who, on March 21, 1952, validly exercised the option to extend. Later W. assigned the premises to his wife. In September, 1957, the wife gave up the premises, leaving rent unpaid and having committed breaches of the covenant to repair.

The lessor B. obtained judgment against her for £818. No recovery was made under that judgment, and the lessor thereupon instituted the present proceedings against the original lessee M., who contended that his liability terminated at the expiry date of the original seven-year lease, November 1, 1953. He brought in the first assignee as third party, claiming an indemnity against her, and she, in turn, brought in W., claiming a like indemnity under the second assignment.

On a preliminary issue as to whether the original lessee remained liable for the defaults of the assignee after the expiration of his original lease:—

Held, that the original lessee remained liable by privity of contract, for the effect in law of the supplemental deed was to vary at its date, namely, March 23, 1949, the seven-year lease by building into it an option which, when exercised, would enlarge the term retrospectively to one of 11 years. Accordingly, the rule of law that an alteration in the term of an existing lease can operate only as a surrender of the old lease and a grant of a new

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one applied in March, 1949, and not when the option was exercised in 1952, for the exercise of the option was not a consensual matter but a unilateral act, consistent with the contract between the original parties, which by its own force enlarged the demise.

Dictum of Maugham J. in *In re Savile Settled Estates* [1931] 2 Ch. 210, 217 considered.

Decision of McNair J. affirmed.

Appeal from McNair J. on a preliminary issue.

By a lease under seal dated February 17, 1947, made between the plaintiff, Frederick Jonas Baker, as the landlord of a dwelling-house, and the defendant, Henry Merckel, as the tenant (which expression included his successors in title), the landlord demised to the tenant certain premises for a term of seven years from November 1, 1946, at a yearly rent of £150. The tenant covenanted to keep the demised premises in good and tenantable repair, and in the third and last years of the term to paint the external wood and iron work.

In 1949 the landlord and the tenant came to an agreement which was embodied in a supplemental deed endorsed on the lease. It was in the following terms: "This deed made March 23, "1949, between the within-named Frederick Jonas Baker of the "one part and the within-named Henry Walter Merckel of "the other part is supplemental to the within-written lease. "Whereas it has been agreed between the parties hereto that "the term granted by the within-written lease shall be extended "for a further period of four years at the option of the tenant. "Now this deed witnesseth and it is hereby agreed and declared "that if the tenant shall give notice in writing to the landlord "before November 1, 1952, of such his desire the within-written "lease shall thereupon be read, construed and take effect as "though the term thereby granted was for a period of 11 years "from November 1, 1946, and that the tenant shall paint the "external wood and iron work of the demised premises with two "coats of good oil paint and in a workmanlike manner in the "fifth, eighth and last years of the term and not as provided in "clause 2 (e) of the within-written lease."

By a deed of assignment made on April 9, 1951, the tenant assigned to the third party, Mrs. Anson, the premises comprised in the original lease, with the benefit of the option to renew referred to in the recital to the deed, being the option conferred by the deed of March 23, 1949.

On October 18, 1951, the third party by a similar document assigned the premises to the fourth party, James Donald White.

In 1952 the fourth party validly exercised the option. Later in 1952 the fourth party, in his turn, assigned to one Mrs. Dorothy White.

In September, 1957, Mrs. Dorothy White gave up possession, leaving rent unpaid, and having committed breaches of the covenant to repair. The landlord obtained judgment against her for £818 8s. 11d. No recovery was made under that judgment, and the landlord then instituted proceedings against the original tenant, Merckel, seeking to recover the same sum against him. The defence admitted the original lease and the supplemental deed but denied that the option was validly exercised. The original tenant contended that his liability terminated at November 1, 1953, the expiry date of the original lease. He brought in his assignee, Mrs. Anson, as third party, claiming from her an indemnity under the first assignment, and she brought in White, the fourth party, claiming the like indemnity under the second assignment.

McNair J. had three preliminary issues to decide: (1) Whether the option to call for an extension of the lease could be validly exercised by the subsequent assignee; (2) if so, whether it was validly exercised; and (3) if it was validly exercised, whether the tenant Merckel, as the original lessee, was liable for rent falling due and dilapidations arising after the expiration of the term of his original lease. He decided on December 10, 1958, that the option could be and had been validly exercised, and that the original tenant was liable in respect of rent and dilapidations arising after the expiration of the term of the original lease.

The original tenant and the third party, Mrs. Anson, appealed, the main burden of the argument being carried on behalf of the third party, Mrs. Anson, the original tenant Merckel being represented at the hearing of the appeal and adopting the submissions for the third party in order to maintain his position on the issue of costs.

R. O. Wilberforce Q.C. and *Alan Campbell* for the first assignee. First, when the option was granted in 1949 by the supplemental deed the position between landlord and tenant was that there were two separate contractual positions and not one, namely, an original lease of 1947 for seven years, plus a deed—a collateral contract—agreeing to grant a further lease, made at a later date. *Hand* v. *Hall*,[1] *per* Lord Cairns C., is authority in the Court of Appeal that the presence of an option does not affect, extend or modify the original demise, option and demise being two separate things. The option in that case, where there was only one document, had to be exercised before the tenant got any further term. The present case, where there are two documents, is stronger; and the word "thereupon" in the supplemental deed underlines the fact that it is only on the exercise of the option that the term is altered; but when it was exercised it brought into existence, under the law of landlord and tenant, a different lease to which the original tenant was never a party.

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[1] (1877) 2 Ex.D. 318, 355, 357 (C.A.).

Secondly, the alteration of the term previously granted could only be effected by the operation of the doctrine of surrender of the old and regrant of a new lease. Maugham J. stated that rule of law in *In re Savile Settled Estates*[2] not merely obiter but in a context relevant to what he had to decide, namely, the legal technical effect of extending a term. [Halsbury's Laws of England, 3rd ed., vol. 23, pp. 683 and 685, and Foa on Landlord and Tenant, 7th ed., p. 617, were also referred to.]

Thirdly, McNair J. erred in saying that if the doctrine of surrender and regrant applied at all to the facts of this case, it did so in 1949 when the supplemental deed was signed, and that the original tenant could therefore be made liable for breaches by the assignee. That cannot be right, for the agreement for a new lease was conditional on the happening of an event, namely, the exercise of the option; and the surrender of the seven-year lease did not take place until that condition was fulfilled in 1952. Until that happened the tenant's only obligations were those under the seven-year lease. Support for that submission is found in *Inland Revenue Commissioners* v. *Earl of Derby*[3] (approved in *Cornish* v. *Brook Green Laundry Co. Ltd.*[4]), where Horridge J. held that a new agreement became effective as a surrender only when a condition was complied with.

McNair J. erred in holding that the supplemental deed was a variation of the seven-year lease, that the two documents must be read together, and that the term was converted retrospectively on the happening of the stipulated event. He did not sufficiently analyse the manner in which the conversion took place. He treated this as a matter of contract and was misled into ruling as he did by introducing into this highly technical branch of the law of landlord and tenant purely contractual rules and "the "intention of the parties." This landlord, by granting an assignable option to the tenant, has produced a situation in which he cannot look to the original tenant but only to the second assignee for relief.

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[2] [1931] 2 Ch. 210, 217.

[3] [1914] 3 K.B. 1186.

[4] [1959] 1 Q.B. 394; [1959] 2 W.L.R. 215; [1959] 1 All E.R. 375 (C.A.).

R. E. Megarry Q.C. and *Michael Underhill* for the landlord. First, the submissions on the legal effect of the notice of 1952 made in this court are outside the terms of the notice of appeal which is limited to the judge's alleged error in construing the option deed of 1949. The point is not pressed, but it is right to draw the court's attention to it.

[SELLERS L.J. The grounds set out in a notice of appeal are only to save costs and for the convenience of the court. There is a statutory right to a rehearing in this court, and the submissions for the tenant have not been so irrelevant that the court would shut them out on that formal ground.]

Secondly, remarkable and startling consequences would follow from an acceptance of the submission that when the notice to exercise the option was given, the original lease perished by automatic surrender and the original lessee was thereby released from all liability for any future events, while the assignee who gave the notice had thereby imposed on him all the liability of the original lessee for the future. That submission is a new doctrine unsupported by authority and would require changes in the existing books of precedents. There is no distinction, under the rule as to surrender and regrant, between a power to extend and a power to curtail the term of a lease, and it would follow that an original lessee of a 21-year lease might be relieved of all future liability if his assignee exercised a power to break at seven or 14 years. An assignee may be a much less satisfactory tenant than the original lessee, and landlords might suffer hardship if this application of the accepted doctrine were held to be correct.

Thirdly, on the substance of this transaction, the deed of 1949 was a bargain between the original landlord and original tenant and provided that if a certain event occurred the original lease was to be read as if for "seven years" it said "11 years." The one qualifying event, namely, the giving of the notice, has been validly carried out, and unless some clear rule of law prohibits the court from requiring the parties to the original bargain to carry out its terms, the court should enforce that bargain. An assignable option to extend a term at the same rent by a unilateral act may be a thing of value in the hands of the original tenant, something for which he may obtain consideration.

Fourthly, the doctrine as to surrender and regrant does not prohibit the court from enforcing the terms of this contract. That doctrine is based on estoppel and operates only where there is a consensual surrender and regrant of a new term as between the original parties. Its application to the present facts is vitiated by three major fallacies: First, the fallacy that the same rule as to automatic surrender on the consensual grant of a new term applies to the unilateral exercise of an option to extend. There was no new consensual bargain in 1952 between the original parties, but only the unilateral exercise by one of them of a power reserved by the original lease. Lord Greene M.R. in *Hankey* v. *Clavering*[5] supports the submission that a notice of this kind is not a consensual but a unilateral document which by its own force brings the term to an end. [Halsbury's Laws of England, 3rd ed., vol. 23, p. 686; Woodfall on Landlord and Tenant, 25th ed., pp. 967, 969; Foa on Landlord and Tenant, 8th ed., p. 635; and *Dodd* v. *Acklom*[6] were also referred to.] Secondly, if the doctrine of surrender and regrant, which is based on estoppel, does apply to a unilateral act—which is not conceded—it will operate only between the parties to the transaction in 1952 and will not bind the plaintiff and the defendant in the present action, namely, the original landlord and tenant.

[HAVERS J. Then the landlord could sue the original lessee under the lease and sue the assignee under the lease created by estoppel?]

He could not get his rent twice over. In *In re Bruce, Brudenell* v. *Brudenell*[7] Clauson J. explicitly confined the rule as to automatic surrender and regrant to the parties to the bargain. [*In re Arkwright's Settlement, Phoenix Assurance Co. Ltd.* v. *Arkwright*[8] was also referred to.] What Maugham J. said in *In re Savile Settled Estates*[9]—a case concerned with a consensual and not a unilateral arrangement—was a dictum on the law which was not directly in point and had not been argued. Thirdly, the appellants are wrong in contending that there is any distinction in substance or effect between a unilateral notice given by the tenant and an automatic event such as "if war breaks out." This is shown by a decision under the technical rule in *Lawes*

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[5] [1942] 2 K.B. 326, 329; [1942] 2 All E.R. 311 (C.A.).

[6] (1843) 6 Man. & G. 672, 679.

[7] [1932] 1 Ch. 316, 328.

[8] [1945] Ch. 195; 61 T.L.R. 257; [1945] 1 All E.R. 404.

[9] [1931] 2 Ch. 210, 217.

v. *Bennett*[10] on the application of the equitable doctrine of conversion to options in *Weeding* v. *Weeding*,[11] and assists on the effect of the exercise of an option. *Hand* v. *Hall*[12] is distinguishable, for there the essential point was the divisibility of the agreement, as was emphasised in *Gray* v. *Spyer*[13]; but here there is no question of the divisibility of the original lease and the deed of 1949. *Inland Revenue Commissioners* v. *Earl of Derby*[14] does not assist, for it was not concerned with the exercise of an option.

In the present case there was, in March, 1949, between the original parties a transaction by deed in the form and terms necessary to create any legal estate that was necessary, and as from that date, by force of the original lease and the supplemental deed endorsed on it, the term between the parties was one that could not be less than seven years nor more than 11 years, and whether it was to be seven or 11 depended on whether or not the tenant gave the requisite notice in the future. That was the transaction which was the subject of the assignments taken by the first and second assignees. What was assigned was a lease with a built-in possibility of "11" instead of "seven"; it was not something put there afterwards; nor was it a new transaction inconsistent with the old. The option written in in March, 1949, should be given effect according to its tenor between the parties and no rule of law compels the court to hold that there was any surrender and regrant on the mere exercise of a unilateral power which carried out the terms of the lease and was not inconsistent with them. [*Holme* v. *Brunskill*[15] was also referred to.]

Wilberforce Q.C. in reply. The authorities and the textbooks relied on show that the transaction for which the tenant contends is not unusual, the short question being whether the effect of the deed of 1949 was to write the option into the original seven-year lease, or whether it remained a collateral contract, intended to operate in the future when the person who had the benefit of the option exercised it. It is accepted that in a case like the present the assignee can bring down the original lease, since the exercise of the option has the effect in law of granting a new lease to the assignee under which he becomes an original lessee, and the original lessee drops out. That must follow when the assignee is given power to exercise the option.

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[10] (1785) 1 Cox Eq.Cas. 167.

[11] (1861) 1 J. & H. 424, 430.

[12] 2 Ex.D. 318, 355 (C.A.).

[13] [1922] 2 Ch. 22, 33 (C.A.).

[14] [1914] 3 K.B. 1186.

[15] (1878) 3 Q.B.D. 495 (C.A.)

There is no question of the court being required to enforce the bargain between the landlord and tenant. That bargain has already been carried out, for the option was made assignable. The only question is the effect which its carrying out has on the liability of the original tenant. Nothing in the documents or the nature of the bargain prevents the court concluding that the obligations of the new lease were on the person who became entitled to it.

On the suggested fallacies, it is conceded that if the deed of 1949 was written into the original lease, the notice to extend was merely a unilateral act; but if the exercise of the option was something consequential which had to operate on the lease, it operates as a surrender and regrant. It is conceded that notices operate by their own force where the exercise of the power is written into the original lease; but that is not the position here. The proposition that in cases where the doctrine of implied surrender and regrant applies all that happens is a tenancy by estoppel between tenant and lessor which does not affect the original lease between original landlord and tenant is an extraordinary one; and the conception of two periods running side by side, one by estoppel and one by grant, is an impossible doctrine. The authorities do not support the submission that the doctrine operates only by way of estoppel; they say that the tenant is estopped from denying that the landlord has power to grant a new lease, and that the landlord cannot grant the new lease while the old one is outstanding. There is no question here of the original tenant being bound by something to which he was not a party, but only of his being released from obligations to which he might otherwise be liable.

The distinction made is not that between giving of notice and an automatic event, but between the exercise of a power within the lease and altering the term of the lease by some bargain outside it. The authorities on which the tenant has relied support the submission that a mere option to grant an extension of a lease operates as something which does not affect the original demise until the condition is fulfilled, but then affects it as a surrender and regrant.

Cur. adv. vult.

Feb. 22. Sellers L.J. I would uphold the decision of McNair J. on the basis that the supplemental deed of March, 1949, had the effect in law of supplanting the original lease by a new one, the terms of which are derived from reading the two documents together. The effect is to include the option as if it had been in the original lease. There was, therefore, while the landlord and tenant were in direct contractual relationship, a contractual right by unilateral action of the tenant to enlarge the term from seven to 11 years, and to vary by the same action the provisions as to the painting of the outside of the premises.

The rule of law on which the appellants relied to attack both the findings of the judge on the only issue under appeal was stated by Maugham J. in *In re Savile Settled Estates*[1]: "An "alteration of an existing lease so that it will operate for a term "extending beyond the original term can operate, in law, only "as a surrender of the old lease and a grant of a new one," and I do not understand Mr. Megarry to challenge the rule. It does not involve the universal application of a rule of surrender and regrant in the case of every alteration of the term of a lease.

The argument for the appellants was that the operation of the rule did not take place until the option was exercised in 1952 by the fourth party as assignee of the third party, who was an assignee of the defendant, the original lessee, and, therefore, the tenant was not bound to the landlord after the expiration of the seven years as he was not a party to the extended lease.

But what was done in 1949 was not a mere agreement for the future; it was the granting and obtaining by mutual agreement of a right which the tenant could at his option exercise, and which at once became an enforceable part of the contract. The agreement did not of itself enlarge the original term but it provided that it might be extended without any further consent of the lessor and was, therefore, a substantial alteration of a character to which the rule applies.

While the agreement for the option was consensual and in law effected a new lease, the exercise of the option, as I think Mr. Megarry rightly contended, was unilateral. He cited, aptly and with resource, the words of Lord Greene M.R. in *Hankey* v. *Clavering*[2]: "Notices of this kind are documents of a technical "nature, technical because they are not consensual documents, "but, if they are in proper form, they have of their own force, "without any assent by the recipient, the effect of bringing the "demise to an end." Here the notice had the effect of enlarging the demise, of its own force. It was in fulfilment of and in accordance with the agreement and not inconsistent with it or in variation of it. No new bargain was struck in 1952. That which had been agreed as permissible became effective.

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[1] [1931] 2 Ch. 210, 217.

[2] [1942] 2 K.B. 326, 329; [1942] 2 All E.R. 311 (C.A.).

I have not restated the facts and the relevant documents which have been so clearly and concisely summarised by the judge, and in the judgment of Pearce L.J., with which Havers J. asks me to say he agrees, as I do also in its more complete review of the arguments and in its conclusions.

I do not think the original tenant can escape from the burden he undertook as a lessee of the landlord, and I would dismiss the appeal.

PEARCE L.J. stated the facts as set out above, and continued: The appellants contend before us that on the last point the judge was in error on the following grounds: The alteration of the term of a lease is the alteration of an interest in land. The nature of the tenant's interest could only be altered during the currency of the lease by the surrender of the existing interest and a new grant of the fresh interest. That is not a matter of intention but a matter of legal implication. In *In re Savile Settled Estates*[3] Maugham J. said: "I should add that, in my opinion, an alteration of an existing lease so that it will operate for a term extending beyond the original term can operate, in law, only as a surrender of the old lease and a grant of a new one. . . ."

The original lease, therefore, was surrendered when the option was exercised by the fourth party in 1952. Thereafter, the defendant was divested of his liability as original lessee, and the fourth party became the original lessee of the fresh grant under which, thenceforward, the premises must be deemed to be held. The judge, it is said, was wrong in deciding that the surrender and fresh grant need not be implied or that they must, in any case, have occurred in 1949 at the time when the option was embodied in the supplemental deed, for that option did not affect the lease until it was exercised. It never became part of the demise but was merely a collateral bargain as in *Hand* v. *Hall*,[4] where it was held that the presence of an option in the agreement there under consideration did not vary or modify the original demise until the option was exercised.

The present case, it was said, was in some sense stronger than *Hand* v. *Hall*,[4] since in our case the option was a separate subsequent contract embodied in a supplemental deed, and the use of the word "thereupon" suggests that the option was to affect the lease on the exercise of the option and not before. Reliance was also placed on *Inland Revenue Commissioners* v. *Earl of Derby*,[5] as showing that the implied surrender and fresh grant do not take effect until all the conditions of the fresh grant (in our case the exercise of the option) have been fulfilled, and until specific performance could have been granted.

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[3] [1931] 2 Ch. 210, 217.

[4] (1877) L.R. 2 Ex.D. 318, 355 (C.A.).

The point is short and turns on when the supplemental deed affected the demise and what that effect was.

In spite of the clarity and force of Mr. Wilberforce's argument, I find myself unable to assent to it. I think it would be wrong to hold that the demise was unaffected by the option until its exercise in 1952. The judge did not feel that it was necessary to imply a surrender and fresh grant. However, he held that in any event, if, contrary to his view, there had to be such an implication, it occurred in 1949 when the option was given, when the tenant would still be the original lessee of the fresh grant, and when the same legal consequences would follow as under the original grant. I incline to the latter view in preference to the former. Although the implication of surrender and fresh grant is a fiction based on estoppel, and, as Clauson J. said in *In re Bruce, Brudenell* v. *Brudenell*,[6] it is not to be encouraged or extended, it is not easy on the authorities to avoid the implication of a surrender and fresh grant where such a change is made in the term, namely, a variation of a term of seven years to a term of seven years with an option for a further four years. But I agree with the judge when he said that, if it be necessary that the variation of the existing term could only operate as a surrender of the original lease and the grant of a new lease, he should feel no difficulty in saying that the effect of the supplemental deed was to work a surrender of the original lease and the grant of a new lease for seven years or, on the happening of a specified event, for 11 years. So to hold would, in my view, carry out the intention of the parties as it appears from the document. By a consensual variation embodied in the supplemental deed endorsed on the lease there was built into the original lease of seven years an option that changed the demise from one of seven years to one which might extend to 11 years on the exercise of the option. It was at that stage that the variation was made. Owing to the clause which was so built into the lease, the

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[5] [1914] 3 K.B. 1186.

[6] [1932] 1 Ch. 316, 328.

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happening of an event (namely, the exercise of the option), was to have a retrospective effect and to cause the deed to be read and construed as though it had originally been a lease for 11 years, and to affect the repairing covenant not only thereafter but retrospectively. From the wording of that document, I do not find it possible to regard it as a mere collateral option which did not affect the demise until it was exercised. It is plain that when the supplemental deed was endorsed on the lease the parties regarded the transaction as one demise which might be for seven years or might, on a certain event, continue for 11 years.

There was, therefore, no consensual variation after 1949. The exercise of the option was not a consensual matter. In a dictum which Mr. Megarry's learning elicited from an otherwise irrelevant case (*Hankey* v. *Clavering* [7]), Lord Greene M.R., dealing with a notice to determine, said [8]: "Notices of this kind are documents "of a technical nature, technical because they are not consensual "documents, but, if they are in proper form, they have of their "own force, without any assent by the recipient, the effect of "bringing the demise to an end." The words are equally applicable to a notice of extension. The extension caused by the exercise of the option was not dependent on the landlord's consent. It was not in conflict with the lease as altered in 1949, but arose out of and in accordance with its terms.

Like the judge, I see no rule of law on the facts of this case that prevents us from giving effect to what the parties intended. In my view, he was right in deciding that the tenant is still by privity of contract as original lessee liable in respect of the fourth party's defaults.

Appeal dismissed with costs to be paid by the third party to the plaintiff and to the defendant.

Solicitors: *Otto K. Pollak; Wilkinsons for F. E. Baldock, Guildford; Kenneth Brown, Baker, Baker.*

M. M. H.

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[7] [1942] 2 K.B. 326.

[8] Ibid. 329.

AUTEN v. RAYNER AND OTHERS (No. 2).
AUTEN v. BAKER TODMAN & CO. (SUED AS A FIRM) AND ANOTHER.
SAME v. SAME.

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Feb. 25.

Glyn-Jones J.

[1956 A. No. 1699.]
[1956 A. No. 1698.]

Crown—Privilege—Evidence—Police reports, etc.—Entries in detective's diary—Sealed by order of Home Secretary after personal examination —Minister's certificate—Whether conclusive—Documents privileged when in possession of detective—Whether privileged when in possession of Director of Public Prosecutions—Attorney-General—Right to claim privilege in face of court.

Practice — Discovery — Privilege — Professional privilege — Director of Public Prosecutions—Documents relating to criminal prosecution.

Practice—Subpoena duces tecum—Late service—Whether ground for setting aside.

Certain entries in the diaries of a detective in the fraud department of the Criminal Investigation Department, the third defendant in an action in which all three defendants were charged, inter alia, with conspiracy, false imprisonment and malicious prosecution, had been sealed by order of the Home Secretary, who claimed Crown privilege on the ground that their disclosure would be injurious to the public because they indicated or tended to identify sources of police information. During the hearing of the action application was made on behalf of the plaintiff for the unsealing of the entries, on the ground that there was evidence to show that they were not within the class of documents to which Crown privilege applied. A subpoena was also served on a member of the staff of the Director of Public Prosecutions requiring him to produce all documents in his possession relevant to the issues in the action, and naming five specific classes of documents, namely, police reports, memoranda or notes of interviews, relevant entries in his official diaries, notes of conferences, briefs and instructions to prosecuting counsel in the trial of the plaintiff at the Central Criminal Court, and proofs of witnesses accompanying the briefs.

Objection was taken by the Crown, Crown privilege being claimed in respect of the entries in the diaries, the police reports and other classes of documents covered by the subpoena. In respect of the last two classes of documents professional privilege was claimed:—

Held, (1) that the claim for Crown privilege in respect of the entries in the diaries was not one made in respect of a class of documents but in respect of each and every sealed entry, and the court had no power to go behind the certificate of the Home Secretary in respect thereof.

Dictum in *Auten* v. *Rayner* [1958] 1 W.L.R. 1300, 1310; [1958] 3 All E.R. 566 (C.A.) considered.

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(2) That a claim for Crown privilege in respect of the police reports, upheld while the reports were in the possession of the detective, still applied although the reports were now in the possession of the Director of Public Prosecutions.

(3) That, in so far as memoranda and notes of interviews and entries in official diaries were concerned, a claim for Crown privilege could be made in face of the court, and it was unnecessary for that claim to be supported by an affidavit by the Attorney-General; and as the claim had been made the court could not go behind it and order the production of the documents.

(4) That, whether or not there was a precise analogy between the position of the Director of Public Prosecutions and a solicitor, the rules of public policy which had resulted in the establishment of a right of a client and a solicitor to claim privilege as to documents and statements in the possession of the solicitor applied with equal, if not greater, force to the Director of Public Prosecutions.

(5) That, accordingly, the subpoena would be set aside in so far as it required the production of specific classes of documents, and also in respect of the other documents called for which must fall within one or other of the specified classes. In the result the whole subpoena would be set aside.

The fact that a subpoena is served late is not sufficient ground for saying that its service is an abuse of the process of the court.

APPLICATION to set aside subpoena duces tecum.

On September 1, 1956, the plaintiff, Harold William Auten, issued a writ against Colonel Gordon W. G. Rayner, his wife, Eileen Mowbray Rayner, and Patrick Bolongaro, a detective-constable (afterwards detective-sergeant) stationed at Scotland Yard and employed in the company fraud department of the Criminal Investigation Department. Damages were claimed for conspiracy, malicious arrest and prosecution, abuse of process, false imprisonment and injurious falsehood. There was also a second action, consolidated with the first, by the plaintiff against a firm of accountants and a clerk in that firm.

On November 4, 1958, the Court of Appeal,[1] on an appeal by the plaintiff, upheld an order made on April 23, 1958, by Master Harwood (which had been affirmed by an order of Ashworth J. in chambers) refusing to order that the detective should produce for inspection his reports to senior officers and communications between the Metropolitan Police Force and other forces, objection to their production having been made by the Home Secretary (the Rt. Hon. R. A. Butler, Esq., M.P.) on the ground that they belonged to a class which it was necessary in the public interest for the proper functioning of the public service to withhold from production. At the hearing of the appeal a further appeal against a refusal to order the production of the detective's diaries was dismissed, as it was agreed between the parties that, without prejudice to their contentions or those of the Commissioner of the Metropolitan Police, certain of the diaries, then in the detective's possession or in the possession of the Commissioner of the Metropolitan Police, should be treated for all purposes as having been disclosed subject to any claims for privilege relating thereto. Certain passages in the diaries were sealed by brown paper, the Home Secretary stating, in an affidavit sworn on October 21, 1958: "I have carefully considered the "contents of the remaining entries in the diaries and I have "formed the opinion that it would be injurious to the public "interest if those entries which I have caused to be covered with "brown paper were to be disclosed, because they indicate or tend "to identify the sources of information given in confidence for "the purposes of a criminal investigation . . . I object to the "disclosure of the entries covered up with brown paper."

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[1] [1958] 1 W.L.R. 1300; [1958] 3 All E.R. 566 (C.A.).

The trial of the action began on January 18, 1960. On January 22, counsel for the plaintiff informed the judge that in due course he would invite him to unseal certain of the entries in the diaries for which Crown privilege had been claimed, on the ground that it appeared from other evidence that they were not within the category for which Crown privilege was claimed. He relied on observations in the judgment of the Court of Appeal in 1958.[2]

On February 25, the day fixed for the hearing of the plaintiff's application, a subpoena duces tecum was served on one Hugh MacDermott, a member of the staff of the Director of Public Prosecutions, requiring him to produce the following documents:

"(1) All correspondence and other documents in your possession relating to the matters in issue in this suit and in particular "to the investigations, the preliminary proceedings, the seeking "and interviewing of potential witnesses, and the trial in the "prosecution *Regina* v. *Auten*.[3]

"(2) Reports of the defendant Bolongaro and of other officers "of the Metropolitan and other police forces.

"(3) Memoranda or notes of interviews.

"(4) Relevant entries in your official diaries for the material "period.

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[2] [1958] 1 W.L.R. 1300, 1310.

[3] Unreported, C.C.C., April 23, 1956.

"(5) Notes of conferences, your briefs and instructions to "prosecuting counsel at the Central Criminal Court, and any "opinions from them.

"(6) Proofs of witnesses and all other material accompanying "your briefs."

Objection was made on behalf of the Crown, a claim for Crown privilege being made in respect of the first four classes of documents and a claim for professional privilege in respect of the last two classes.

Neil Lawson Q.C., John Platts-Mills and David Turner-Samuels, for the plaintiff, called for the production of the documents referred to in the subpoena duces tecum.

Sir Reginald Manningham-Buller Q.C., A.-G. and *J. R. Cumming-Bruce* for the Crown. The documents covered by the subpoena include police reports which have already been held by the Court of Appeal to be protected by Crown privilege: see *Auten* v. *Rayner*.[4] That claim for Crown privilege has never since been challenged, and to call for those reports now is an abuse of the process of the court. The subpoena also requires the production of certain classes of documents in the possession of the Director for which a claim of Crown privilege will be made and put on affidavit if the court so desires; and the production of other documents which it is submitted are protected by professional privilege. In those circumstances the court is invited to set aside the subpoena as far as those classes of documents are concerned. It should be observed that long notice was given of the plaintiff's intention to challenge a claim for Crown privilege in respect of certain sealed entries in the diaries kept by the defendant Bolongaro in the course of his duties, but no notice was given of any intention to serve this subpoena duces tecum, which was in fact received only this morning.

The claim for Crown privilege is made (1) in respect of certain classes of documents, and (2) in respect of the entries in the diaries. As to (1), it is submitted that Crown privilege still applies to the police reports although those reports were, at the time of the judgment of the Court of Appeal, in the possession of Bolongaro or the Commissioner of Metropolitan Police, and have now passed into the possession of the Director. If Crown privilege does not still apply, a fresh claim will be made if the request for the production of the reports is pursued.

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[4] [1958] 1 W.L.R. 1300.

[GLYN-JONES J. It would seem difficult to see why, if a claim for Crown privilege was properly made in respect of police reports when in the possession of Bolongaro or the police, it will cease to apply when they pass into the possession of the Director. They are the same documents and the same reasons apply.]

As to (2), the claim for Crown privilege in respect of the brown sealed entries is not made in respect of a class of documents but in respect of the content of the entries. That claim, which was supported by an affidavit of the Home Secretary as long ago as October 21, 1958, has hitherto never been challenged, and it is submitted that it cannot be challenged. It has been held repeatedly that in such a case the Minister's certificate is conclusive. The plaintiff may seek to rely on a sentence in the judgment of the Court of Appeal [5] which raised the question as to what the result might be in a case where the Minister's certificate or conclusion were prima facie expressly based on the premise that the document or documents which he had determined to withhold was or were of a particular character or class and it were then shown aliunde that in fact he had been mistaken in the premises. The Court of Appeal expressed no view on that question, which did not arise in the appeal, the decision relating to a particular class of documents, the police reports. It is admitted that the Minister's certificate would not be conclusive if it could be shown aliunde that the documents for which privilege was claimed were, for example, nothing but a collection of bus tickets, but it is submitted that the dictum of the Court of Appeal has no bearing on a claim for privilege made not in respect of documents of a particular class or character but based on the actual content of particular entries which the Minister has personally examined.

As to the documents called for under paragraphs 3 and 4 of the subpoena, those are classes of documents which have hitherto never been called for and a claim for Crown privilege will be made in respect of them. The effect of such a claim will be to stop any further inquiry by the court, as the validity of the Minister's certificate cannot be questioned.

With regard to the documents called for in paragraphs 5 and 6, in so far as they cannot properly be made the subject of a claim for Crown privilege, it is submitted that those are clearly protected by professional privilege. Claims for professional privilege in respect of such documents which have been repeatedly made by the Director on other occasions do not appear ever to have been challenged.

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[5] [1958] 1 W.L.R. 1300, 1310.

[GLYN-JONES J. Has the question whether the Director is entitled to claim professional privilege ever been decided by any court? In the ordinary way the privilege is that of the client, and the solicitor is entitled to say he cannot produce the documents unless his client waives the privilege.]

Here the Director is himself the client and he could waive the privilege. He does not intend to do so in respect of the instructions given to counsel and the proofs of witnesses taken for the purpose of the criminal prosecution. There may be certain oral evidence to which he would not object.

As to the documents referred to in paragraph 1 of the subpoena, most of those come into one or other of the categories specified in paragraphs 2 to 6. It is to be observed that this subpoena was only served after the case has been proceeding for six weeks, when discovery has taken place years ago, and after the claim for privilege in respect of the police reports has already been upheld by the Court of Appeal. The subpoena should be set aside.

Neil Lawson Q.C., *John Platts-Mills* and *David Turner-Samuels* for the plaintiff. As to the unsealing of the brown entries in the diaries, it is accepted for the purpose of the present argument that the authorities showing that the Home Secretary's certificate is conclusive are binding on the court, but the basis of the Home Secretary's objection is that the sealed entries tend to indicate or identify sources of police information and relate, inter alia, to meeting places at which informers or potential informers were interviewed. If the court can be satisfied aliunde in respect of any particular sealed entry that there is evidence which suggests that the Home Secretary is mistaken, the court can be invited to unseal it. In relation to one particular entry, taken as an example, there has been unchallenged evidence given by two witnesses which shows that there is ground for taking the view that the Home Secretary was mistaken in classifying that particular entry or giving it the character to which he has in fact deposed. There are other entries of a similar nature. This is not an omnibus claim to unseal all the entries but to unseal particular entries where the plaintiff can show that there is evidence aliunde which justifies it.

[GLYN-JONES J. I can only read the Home Secretary's affidavit as a statement that he himself has read the entry and, having considered its terms, has decided to claim Crown privilege for it. Even if he is mistaken in suggesting that that particular entry might reveal the source from which the police obtained information, I cannot go behind his affidavit, which is conclusive.]

On that ruling, any discussion as to the unsealing of the brown entries is concluded.

As to the subpoena, it is conceded that the plaintiff cannot call for documents which come within the class of documents considered in the judgment of the Court of Appeal[6]; but that judgment relates only to the police reports. It is not sought to argue that because those have now passed into the possession of the Director they cease to be privileged. But no claim for privilege has yet been made in respect of the classes of documents covered by the other paragraphs of the subpoena, although it has been intimated that such claims will be made. As to paragraph 1, it is conceded that if a claim for Crown privilege is made in the appropriate way, the court will be bound by it, but the plaintiff is entitled to ask that the claim should be made in the proper way. As to the documents covered by paragraphs 3 and 4, if Crown privilege is claimed in relation to all communications, written or oral, passing between Bolongaro and the Director's office, the position is clear, because no evidence can be led as to the subject-matter of any communication at all, but it would seem that Crown privilege is to be claimed in respect of written but not of oral communications. If it is to be waived in so far as oral communications are concerned, and evidence is permitted to be led in respect of them, one should be entitled to test that evidence by reference to entries in official diaries or written reports and memoranda made from time to time. It cannot be right in a case of this kind that a party to proceedings should be allowed to select the matters on which he is going to give evidence.

The Director is not entitled to rely on professional privilege in respect of documents called for in paragraphs 5 and 6. Here, the question is: Who is the solicitor and who is the client? Legal professional privilege cannot exist unless there is in fact the relationship of legal adviser and client existing between two persons. In the case of the Director that is clearly not so.

The fact that this subpoena duces tecum to secure the production of documents similar to those in respect of which there have been interlocutory proceedings and appeals has only been served in the sixth week of the trial is not a matter which can influence the court's decision so far as the documents in the possession of a member of the Director's staff are concerned. It would not have been possible in the normal course of discovery to have this matter ventilated. I need not say why the subpoena was only served at this stage. The vital point is that efforts have been made to ascertain from counsel for the third defendant the way in which this difficult question of Bolongaro vis-à-vis the Director was to be approached in view of the question of Crown privilege arising. The subpoena was served this morning so that these matters could come before the court at the same time as the question of the diaries was considered.

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[6] [1958] 1 W.L.R. 1300.

Sir Reginald Manningham-Buller Q.C., A.-G. in reply. As to the contention that because the Director is in effect both client and solicitor he is not entitled to professional privilege, he is in fact a solicitor, but, even if he were not, it would be argued that professional privilege attaches to him by virtue of his statutory duties. That privilege is analogous to the privilege of solicitor and client. Its purpose is to protect the client's interest and it arises whether there is a private or public prosecution. There is the same need, in the public interest, for the protection of communications between him and counsel as in the ordinary case of solicitor and counsel.

[GLYN-JONES J. Is there the same public interest in the case of communications made by an informer of the police? There is no police privilege. There would have to be a claim for Crown privilege.]

Marks v. *Beyfus*[7] decided that the Director of Public Prosecutions, if called as a witness at a public prosecution or during any proceedings arising out of a public prosecution, is entitled to refuse to disclose the names of informers or any information given by them. That is founded on public policy and it applies not only to the trial of the accused but also to a subsequent civil action between the parties on the ground that the criminal prosecution was maliciously instituted or brought about: see *per* Lord Esher M.R.[8]

[GLYN-JONES J. On that authority it appears that the witness cannot waive the privilege, so that, even if the Director were willing to produce his briefs to counsel and all materials in this case, it would be my duty to refuse to look at them. If it is a rule of law that the judge must prevent the disclosure of the source from whom the prosecuting authority obtained its information, is it right to call the privilege of the Director a professional privilege analogous to that of a solicitor?]

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[7] (1890) 25 Q.B.D. 494 (C.A.).

[8] Ibid. 498.

It may overlap with Crown privilege, but in relation to briefs to counsel and proofs of witnesses in a criminal prosecution it is submitted that the Director, having regard to his position, is clearly entitled to claim the privilege usually accorded to a solicitor, the relationship between him and counsel being the same. As to the principle behind the solicitor's privilege, see *Hobbs* v. *Hobbs and Cousens*,[9] *per* Stevenson J.[10] It exists for the purpose of ensuring that there shall be complete and unqualified confidence in the mind of a client when he goes to his solicitor or to his counsel that that which he there divulges will never be disclosed to anybody. Moreover, legal professional privilege protects from disclosure not only documents which embody communications between a client and his legal adviser which come into existence in the course of litigation, in anticipation thereof, but even documents which without contemplation of any litigation at all come into existence in order to enable the client to obtain the legal advice he requires. The position of the Director is rather curious. Where he is charged by statute with the conduct of prosecutions it would be proper to say that, if professional privilege does not apply, Crown privilege should, because communications between the Director and counsel belong to a class which, for the proper functioning of a public service, should not be produced: see *Duncan* v. *Cammell, Laird & Co. Ltd.*,[11] *per* Viscount Simon L.C.[12] If the court is in doubt whether professional privilege, on the analogy of solicitor and client, can properly be claimed in respect of the documents covered by paragraphs 5 and 6, the court will be invited to give time for the Crown to decide whether to make a claim for Crown privilege in respect of them.

Neil Lawson Q.C. *Marks* v. *Beyfus* [13] is of no assistance in deciding whether documents in the possession of the Director may be the subject of a claim for legal professional privilege.

Christmas Humphreys Q.C. and *H. K. Woolf* for the first and second defendants.

Geoffrey Veale Q.C. and *W. W. Stabb* for the third defendant, the detective.

Maurice Lyell Q.C. and *S. H. Noakes* for the fourth defendants.

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[9] [1960] P. 112; [1959] 3 W.L.R. 942; [1959] 3 All E.R. 827 (P.).

[10] [1960] P. 112, 116.

[11] [1942] A.C. 624; 58 T.L.R. 242; [1942] 1 All E.R. 587 (H.L.).

[12] [1942] A.C. 624, 636.

[13] 25 Q.B.D. 494.

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GLYN-JONES J. Two matters are raised. The first concerns certain entries in diaries kept by the defendant Bolongaro. Some of the entries in those diaries are covered up with blue paper. Those are entries which do not contain any matter relevant to this trial. Others have been sealed and covered up with brown paper. The remainder are left exposed and are open to me or to the parties to read. In respect of entries covered up with brown paper I have an affidavit from the Home Secretary in which he says he has personally examined the entries. He says: "I have carefully "considered the contents of the remaining entries in the said "diaries and I have formed the opinion that it would be injurious "to the public interest if those entries which I have caused to be "covered up with brown paper were to be disclosed." Then he gives his reasons—"because they indicate or tend to identify the "sources of information given in confidence for the purpose of a "criminal investigation." The Home Secretary says: "I object "to the disclosure of the entries covered up with brown paper."

Mr. Lawson refers me to a sentence in the judgment of the Court of Appeal upon an interlocutory appeal in this very case,[1] and the sentence to which he refers is as follows[2]: "In particular, "we express now no view on the question (which in our judg- "ment does not arise on this appeal) what the result might be "in a case where the Secretary of State's certificate or conclusion "were on the face of it expressly based on the premise that the "document or documents which he had determined to withhold "was or were of a particular character or class and it were "then shown aliunde that in fact he had been mistaken in the "premise."

Mr. Lawson says that evidence has been given in this case which appears to suggest that a particular entry which he takes as illustrating his point in all probability does not contain anything which would indicate or tend to identify the sources of information, and so on, spoken of by the Home Secretary in his affidavit. I think the Attorney-General is quite right in saying that this is not a case in which privilege is claimed for a class of documents which are described so that if aliunde I were to discover that a particular document fell outside that class and had been mistakenly included, I might look at it. It is a case in which the Home Secretary by his affidavit says that he has looked at these particular entries, and what he has said in his affidavit applies to each and every entry.

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[1] [1958] 1 W.L.R. 1300; [1958] 3 All E.R. 566 (C.A.).

[2] [1958] 1 W.L.R. 1300, 1310.

In my view, I have no power to go behind the Home Secretary's certificate and look at any of the entries in respect of which and each of which Crown privilege is claimed.

A second question has arisen on which I have had the assistance of the Attorney-General. The writs in these actions were issued on September 1, 1956. The pleadings amount to a bundle of 334 pages, excluding all the affidavits, interrogatories and the like. The bundle consists solely of pleadings and the interlocutory orders on such questions as discovery of documents. There has been the most prolonged and searching inquiry as to what documents should or should not be disclosed that I have ever seen in a case in my experience. There is case after case in which the master has been asked to decide about documents; case after case in which the master's decision has been taken on appeal to the judge; and two cases in which the decision of the judge in chambers has gone to the Court of Appeal. The parties have obviously given profound study to the question of what documents ought to be available before the court in this case. It has been manifest, I think, since the case started that a question would arise here as to the reports made by the defendant Bolongaro and other documents in the possession of the Director of Public Prosecutions; and yet not until today, in the sixth week of the trial, is there served upon the representative of the Director who conducted the prosecution out of which the claim for malicious prosecution arises, or, at any rate, the proceedings before the examining magistrate, a subpoena duces tecum, which was issued as long ago as January 20, and it is only as he was on his way to court to give me the benefit of his help in respect of and in answer to Mr. Lawson's claim to unseal some of the brown entries in the diaries, that the Attorney-General learns for the first time of the issue of such a subpoena. If I felt free, in the exercise of my discretion, to set aside this subpoena on the ground that it has not been served until today, I would do so, but I doubt whether I have discretion so to do. I do not think, within the authorities, the fact that a subpoena is served late is sufficient ground for saying that the service of it is an abuse of the process of the court. But I am asked to set aside the subpoena for other reasons, and it is said that the rules of law compel me to do so. [His Lordship read the subpoena and continued:]

So far as the "reports of the defendant Bolongaro and of "other officers of the Metropolitan or other police forces" are concerned, these are the very reports in respect of which Crown privilege has already been claimed, and in so far as they were at one time, or in so far as any of them were at one time, in possession of the defendant Bolongaro, the Court of Appeal decided that Bolongaro could not be called upon to produce them. They are the same documents still: police reports by Bolongaro to his superiors, by any officer of the Metropolitan Police Force to the Director, and by any member of any other police force to the Metropolitan Police Force; and the Attorney-General says that in so far as it is necessary for him to do so, he would here and now claim Crown privilege, or, alternatively, that the claim to Crown privilege already made in respect of these documents so far as they were in the possession of Bolongaro still applies to prevent their production. I am quite sure that is right.

If it should be necessary—I do not think it is—for any formal claim in respect of the production of these documents by Mr. MacDermott, to be made by any other Minister of the Crown, I should undoubtedly have refused to order the production of the documents for a sufficient time to enable the claim to be made.

So far as the documents in paragraphs 3 and 4 of the subpoena are concerned—"Memoranda or notes of interviews. "Relevant entries in your official diaries"—that is, in Mr. MacDermott's official diaries—they are documents in respect of which the Attorney-General himself here and now claims Crown privilege in front of me, and I cannot go behind that claim. It is quite unnecessary to put the Attorney-General to the trouble of swearing an affidavit. He is obviously entitled to come into court and make his claim to Crown privilege in face of the court, and he has done so. Those documents are not to be produced.

So far as documents in classes 5 and 6 are concerned, the Attorney-General submits that the Director of Public Prosecutions is entitled to claim a professional privilege analogous to the privilege claimed in respect of documents in the possession of a solicitor. There is, perhaps, a little difficulty there, because the right to claim privilege is that of the client rather than the solicitor. The Attorney-General says that for the purpose of such a claim to privilege, the Director is his own client. I am not sure that there is a precise analogy between the position of the Director and the position of a solicitor; but those rules of public policy which have resulted in there being established a right of a client and solicitor to claim privilege as to documents and statements in the possession of the solicitor appear to me to apply

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with equal, if not greater, force to the position of the Director of Public Prosecutions. I regret having to make such a ruling on the spur of the moment, as it were, and without having had the benefit of that fuller argument which I am sure I should have had if the Attorney-General had not been confronted with this subpoena almost on his way to the court, but I think, however full the argument, I should arrive at the same conclusion, and I should much prefer to give my judgment straight away rather than cause any further delay in this case, which has already lasted long enough.

I am going to order this subpoena to be set aside so far as all documents mentioned in paragraphs 2, 3, 4, 5 and 6 are concerned. So far as the documents in paragraph 1 are concerned, it seems to me that almost all of those must fall within one or other of the classes in 2, 3, 4, 5 and 6, and I think the simplest thing for me to do is to set aside the subpoena in respect of that paragraph. I can hardly conceive that there can be any documents which fall outside the classes I have expressly excluded, and I shall take the risk if there are any. I shall set aside the subpoena.

Application refused.
Subpoena set aside.

Solicitors: *W. H. Thompson; Treasury Solicitor; Herbert Baron & Co.; Solicitor, Metropolitan Police; Chamberlain & Co.*

E. M. W.

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Lord Parker C.J., Ashworth and Edmund Davies JJ.

Criminal Law—Sentence—Preventive detention—Notice of intention to prove previous convictions—Service on defendant—Time of service—Meaning of "three days before the trial"—Whether three clear days must elapse—Criminal Justice Act, 1948 (11 *&* 12 *Geo.* 6, *c.* 58), *s.* 23 (1).

Criminal Law—Sentence—Probation order—Breach—Charge of—Procedure on arraignment—Necessity for putting breach to defendant in clearest possible terms.

Words and Phrases—"Before."

The appellant was to be sentenced in respect of his breach of a probation order. On July 18 notice was given to him under section

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[Reported by GROVE HULL, Esq., Barrister-at-Law.]

23 of the Criminal Justice Act, 1948, of intention to prove convictions which would render him liable to a sentence of preventive detention. On July 21 he was brought before the court, when the clerk put the breach of the probation order to the appellant in general terms, asking him only whether he admitted committing a further offence, and he was sentenced to a term of eight years' preventive detention. He appealed:—

Held, that the requirement in section 23 that the notice should be given three days before the trial meant that three clear days must elapse and that, accordingly, the appellant did not qualify for preventive detention and his sentence must be set aside.

Rex v. *Turner* [1910] 1 K.B. 346; 26 T.L.R. 112; 3 Cr.App.R. 103 applied.

Per curiam. The breach alleged must be put to the defendant in the clearest possible terms.

APPEAL AGAINST SENTENCE.

On January 27, 1959, the appellant, Dennis John Long, pleaded guilty at Southampton Borough Quarter Sessions to storebreaking and was placed on probation for three years. On May 27, 1959, he was convicted at Grimsby Quarter Sessions of larceny and was sentenced to three years' imprisonment, nine other offences being taken into consideration. He was returned to Southampton Borough Quarter Sessions for the breach of the probation order to be dealt with. On July 18, notice was given to him under section 23 of the Criminal Justice Act, 1948,[1] of intention to prove convictions which would render him liable to a sentence of preventive detention. The recorder (Ewen Montagu, Esq., Q.C.) adjourned the trial from July 20, when it was to have taken place, to July 21. The appellant was then sentenced to eight years' preventive detention. He appealed against this sentence on the ground, inter alia, that the notice was not given to him three days before the trial within the meaning of section 23 of the Act.

Patricia Coles for the appellant. The general rule is that where anything is to be done at the expiration of a particular number of days from some other event, time is computed by excluding the day of the first event and including the day of the second. The present case falls within an exception to that general rule, since the sentence is not to be passed until three days after the giving of the notice, and in such a case both the day of the giving of the notice and the day of the trial must be excluded, so as to give three clear days: see *Rex* v. *Turner*.[2]

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[1] Criminal Justice Act, 1948, s. 23: "(1) For the purpose of determining "whether an offender is liable to be "sentenced to . . . preventive deten- "tion . . . no account shall be taken "of any previous conviction or sen- "tence unless notice has been given "to the offender . . . at least three "days before the trial that it is "intended to prove the conviction or "sentence; . . ."

[LORD PARKER C.J. referred to Halsbury's Laws of England, 2nd ed., vol. 32, p. 140, and to *Young* v. *Higgon*.[3]]

LORD PARKER C.J. stated the facts, observed that the appellant fully deserved his sentence, referred to section 23 of the Criminal Justice Act, 1948, and continued: The appellant himself, in his notice of appeal, raises the point and, so far as we know, it has never come before the court before. The ordinary rule applicable in these cases is that the day of service is not included but the date of the later event is, and, accordingly, if the general rule applied here, July 18 would not be included but the date of the trial, July 21, would be. Accordingly, the trial would have taken place three days after the service of the notice. On the other hand, there are clear exceptions to that general rule. It is, I think, well stated in Halsbury's Laws of England, 2nd ed., vol. 32, p. 140, where it is said: "When a period is fixed before "the expiration of which an act may not be done, the person "for whose benefit the delay is prescribed has the benefit of the "entire period, and accordingly, in computing it the day from "which it runs as well as the day on which it expires must be "excluded." In other words, in those circumstances the time of so many days is treated as so many clear days.

One of the cases to which Miss Coles has referred us is *Rex* v. *Turner*.[1] There the question arose whether a notice of intention to charge a man with being an habitual criminal had been given not less than seven days before the offender was to be tried, pursuant to section 10 of the Prevention of Crime Act, 1908. It is to be observed that it was there argued that the ordinary rule applied, and that if the ordinary rule applied, that is excluding the first date and including the later one, the notice had been validly served. Channell J., in giving the judgment of the court, said[2]: "Section 10 (4) (*b*) of the Prevention of Crime Act, "1908, provides that 'not less than seven days' ' notice must be "given to the proper officer of the court and to the offender. The "question whether the words 'not less than seven days' mean "clear days is a troublesome one to answer, as there have been

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[2] [1910] 1 K.B. 346; 26 T.L.R. 112; 3 Cr.App.R. 103.

[3] (1840) 6 M. & W. 49.

[1] [1910] 1 K.B. 346; 26 T.L.R. 112; 3 Cr.App.R. 103.

[2] [1910] 1 K.B. 346, 359.

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"decisions upon similar words which are not exactly in accord. "Those decisions depend upon particular statutes, and may "therefore all be right and yet bring about apparently conflicting "results. We have come to the conclusion that the decision most "nearly in point is that in *Chambers* v. *Smith*,[3] referred to by "Chitty J. in *In re Railway Sleepers Supply Co.*,[4] where he "reviewed the authorities. In *Chambers* v. *Smith*[5] the words "were 'not being less than fifteen days,' and the court in the "first instance held that what I may call the ordinary rule "applied, namely, that where a certain number of days are "specified they are to be reckoned exclusive of one of the days "and inclusive of the other unless clear days are expressed. But "although that is the rule, the difficulty is to ascertain whether "clear days are expressed by the language of the particular "statute. In *Chambers* v. *Smith*[5] the court, after having in the "first instance thought that the words 'not less than fifteen days' "were to be construed according to what I have called the "ordinary rule, namely, inclusive of one of the days and exclusive "of the other, on reconsideration came to the conclusion that "they were to be construed as meaning fifteen clear days. The "words upon which that decision was based are the nearest to be "found in the authorities to those which we have to construe in "the present case, and we therefore come to the conclusion that "the provision that 'not less than seven days'' notice has to be "given means 'seven clear days'' notice, and we so answer the "question."

In the judgment of the court the same interpretation should be put upon the words in section 23 of the Criminal Justice Act, 1948, and the reference to three days there should be read as a reference to three clear days. Accordingly, this man did not qualify for preventive detention in that evidence of his previous convictions could not have been given. Accordingly, the sentence of preventive detention must be set aside.

The court has carefully considered this man's previous history and also the offence of which he was found guilty, namely, storebreaking but without taking anything, and will substitute a sentence of five years' imprisonment, which will, of course, overlap the sentence of three years' imprisonment imposed at Grimsby Quarter Sessions.

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[3] (1843) 12 M. & W. 2.

[4] (1885) 29 Ch.D. 204; 1 T.L.R. 399.

[5] 12 M. & W. 2.

Before leaving this case, I should draw attention to the fact that the procedure laid down for the proof of a subsequent offence when a man is brought up for breach of probation was not observed. The matter was put by the clerk to the appellant in the most general terms. He said: "Do you admit that at "Southampton Borough Quarter Sessions on January 27, 1958, a "probation order for three years was made against you on your "conviction for storebreaking with intent?"—so far, so good—then he went on: "and that having committed a further offence "you have been produced at these sessions for sentence?" The court would like to draw attention again to the necessity for following the procedure which was laid down by this court in *Reg.* v. *Devine*,[6] where the court emphasised that[7] "Where a defen- "dant is brought before a court for breach of a probation order, "when he is arraigned before the court the breach should be put "to him in the clearest possible terms, and he should be asked to "say whether he admits it or not."

Appeal allowed.

Solicitor: *Registrar, Court of Criminal Appeal.*

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[6] [1956] 1 W.L.R. 236; 40 Cr. App.R. 45; [1956] 1 All E.R. 548.

[7] [1956] 1 W.L.R. 236, 237; [1956] 1 All E.R. 548n.

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Practice—Subpoena duces tecum—Late service—Whether ground for setting aside.
Auten *v.* Rayner (No. 2). Auten *v.* Baker Todman & Co. (sued as a firm). Same *v.* Same - - - - - **Glyn-Jones J. 669**

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DEBT—*Committal order—Power of revocation—Committal for non-payment of debt—Debtors Act,* 1869 (32 *&* 33 *Vict. c.* 62), *s.* 5.
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2. —— Justices' jurisdiction. See Town and Country Planning 2.

FITNESS TO PLEAD — Burden of proof. See Criminal Law 4, 5.

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Words and Phrases—"May"—Fugitive Offenders Act, 1881, *s.* 7.
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HABEAS CORPUS—*Protectorate—Jurisdiction—Restriction order requiring native of Northern Rhodesia to remain in certain district of Northern Rhodesia—Restriction order made*

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by Governor of Northern Rhodesia—Whether Northern Rhodesia "foreign dominion" of Crown—Whether foreign territory—Jurisdiction to issue writ to governor—Jurisdiction of court to issue writ overseas—Whether Secretary of State for Colonies a custodian—Whether amenable to issue of writ—Habeas Corpus Act, 1862 (25 *&* 26 *Vict. c.* 20), *s.* 1—*Foreign Jurisdiction Act,* 1890 (53 *&* 54 *Vict. c.* 37).
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Criminal Law—Accessory after the fact—Accessory to accessory—Charge of assisting principal felon—Assistance to accessory to principal felon—Whether indirect assistance to principal.
Criminal Law—Court of Criminal Appeal—Proviso to section 4 (1)—*Coercion of jury—Whether proviso applicable—Criminal Appeal Act,* 1907 (7 *Edw.* 7, *c.* 23), *s.* 4 (1), *proviso.*
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2. —— Direction—Accessory before the fact. See Criminal Law.

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Statutory Duty—Civil right, whether created—Local authority—Duty to maintain drain—Enclosure Acts.
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LANDLORD AND TENANT—*Option to extend term—Assignment—Whether assignor liable under lease after exercise of option by assignee—Whether original lessee liable for defaults of assignee—Effect in law of supplemental deed giving option—Doctrine of surrender and regrant on alteration of term of lease.*
Landlord and Tenant—Surrender and regrant, doctrine of—Alteration in term of existing lease—Supplemental deed giving option to extend term.
Election or Option—Effect of exercise—Lease, extension of—Exercise by assignee—Liability of assignee under lease.
Baker *v.* Merckel. Anson (Third Party) **C.A. 657**

2. —— *Rent restriction—Premium—Paid to third person—Grant of tenancy conditional on sale of house at undervaluation—Person requiring premium—Demand by landlords' agents—Benefit not received by landlords but by separate though associated company—Landlord and Tenant (Rent Control) Act,* 1949 (12, 13 *&* 14 *Geo* 6, *c.* 40), *s.* 2.
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3. —— *Repairs—Weekly tenancy—Implied term—Express conditions of tenancy restricting tenant from doing work to demised premises without consent and reserving to landlords right to enter and do repairs—Tenant required to deliver up premises in good and tenantable repair—Practice of council to do repairs—Tenant of council flat injured by defect in demised premises—Whether term to be implied that landlords must keep premises fit for human habitation—Whether any duty in landlords independent of contract to guard against foreseeable dangers from defect in demised premises of which they have notice.*
Contract—Implied term—Landlord and tenant.
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LIBEL AND SLANDER—*Libel—Privilege—Absolute privilege—Judicial tribunal—Disciplinary Committee of Law Society—Publication of order and findings relating to complaint against solicitor—Statements implicating third party not solicitor—Whether publication protected by absolute privilege—Solicitors Act,* 1957 (5 *&* 6 *Eliz.* 2, *c.* 27), *ss.* 46 (1), 49—*Solicitors (Disciplinary Proceedings) Rules,* 1957 (*S.I.* 1957, *No.* 2240), *r.* 21.
Addis *v.* Crocker - - **Gorman J. 87**

LIEN—Unpaid seller. See Sale of Goods.

LOCAL AUTHORITY—Duty to maintain drain. See Land Drainage.

LOCAL GOVERNMENT—*District auditor—Surcharge—Appeal to Minister from refusal by district auditor to surcharge—Minister's direction to district auditor to surcharge—Surcharge imposed by district auditor in pursuance of Minister's direction—Whether appeal lies to High Court against surcharge so imposed—Whether persons so surcharged may apply for relief to High Court—Local Government Act*, 1933 (23 *&* 24 *Geo.* 5, *c.* 51), *ss.* 229, 230.
DEAN *v.* DISTRICT AUDITOR FOR ASHTON-IN-MAKERFIELD - - - - **Divl.Ct. 149**

2. —— *Property—Damage to—Recovery of expense of making good—Against person who "carelessly or accidentally damages"—Involuntary act—London Government Act*, 1939 (2 *&* 3 *Geo.* 6, *c.* 40), *s.* 181 (3).
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PRACTICE AND PROCEDURE—*Vexatious litigant—Matters to be taken into consideration—"Instituted . . . legal proceedings"—Meaning — Multifarious proceedings over* 24 *years arising out of same claim — Supreme Court of Judicature (Consolidation) Act*, 1925 (15 *&* 16 *Geo.* 5, *c.* 49), *s.* 51 (1).
Statute — Retroactive effect — Appeal — Whether new law applicable — Procedural point or substantive right—Vexatious litigant—New Act extending power of High Court to cover continuing proceedings already instituted by vexatious litigant—Whether Court of Appeal can vary High Court order to accord with new Act—Supreme Court of Judicature (Consolidation) Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 49), *ss.* 27 (1), 51 (1)—*Supreme Court of Judicature (Amendment) Act*, 1959 (7 *&* 8 *Eliz.* 2, *c.* 39), *s.* 1 (1).
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In re VERNAZZA - - - - **C.A. 197**

2. —— *Writ—Service out of jurisdiction—Contract—Cargo to be shipped to safe port in United Kingdom at holders' option—Option to be declared before arrival of ship off Land's End—Sinking of ship before opportunity to declare option—Whether breach of contract for non-delivery within jurisdiction—R.S.C., Ord.* 11, *r.* 1 (*e*).
Ships' Names—St. Elefterio.
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"QUASH"—Meaning. See CRIMINAL LAW 2.

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2. —— *Industrial hereditament — "Non-"industrial building" — Hereditament for testing cables held in* 1931 *to be a factory but not an "industrial hereditament"—Whether "non-industrial building" not "used wholly "or mainly for industrial purposes"—Meaning of "industrial purposes"—Rating and*

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Statute — Construction — Subsequent enactments—Earlier and later Acts to be construed "as one"—Rating and Valuation Act, 1925 *s.* 22 (1) (4)—*Rating and Valuation (Apportionment) Act*, 1928, *ss.* 3, 4.
Crowe (Valuation Officer) *v.* Lloyds British Testing Co. Ltd. - - **C.A. 592**

3. —— *Science, literature or fine arts — Exemption — Library incorporated by Royal Charter — Subscribing members entitled to borrow books for private study — Annual receipt of donations of money and books and of legacies — Whether instituted for purposes of literature exclusively — "Annual voluntary "contribution" — Meaning — Whether supported in part by voluntary contributions — Scientific Societies Act*, 1843 (6 & 7 *Vict. c.* 36), *s.* 1.
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4. —— —— —— *Society "to promote the "development of mechanical engineering"—Supported mainly by annual subscriptions — Whether instituted for purposes of science exclusively—Whether subscriptions voluntary —Scientific Societies Act*, 1843 (6 & 7 *Vict. c.* 36), *s.* 1.
Institution of Mechanical Engineers *v.* Cane (Valuation Officer) and Westminster City Council - - - - - - **C.A. 388**

RELATOR ACTION — Injunction. See Injunction.

RENT RESTRICTION — Premium. See Landlord and Tenant 2.

RHODESIA (Northern)—Foreign dominion of Crown, whether. See Habeas Corpus.

ROAD TRAFFIC — *Third party insurance—Hospital expenses—Policy covering voluntary passengers in addition to persons compulsorily insured—Passenger injured—Payment made by insurers to passenger—Whether made under or in consequence of policy issued under Part II of Road Traffic Act*, 1930—*Hospital treatment received by passenger before date of payment to him and without knowledge of insurers—Whether hospital entitled to recover from insurers expenses incurred—"Any per- "son"—Road Traffic Act*, 1930 (20 & 21 *Geo.* 5, *c.* 43), *s.* 36 (1) (*b*) (2), *as substituted by Road and Rail Traffic Act*, 1933 (23 & 24 *Geo.* 5, *c.* 53), *s.* 33.
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ROAD TRAFFIC—*continued.*

2. —— —— *"Use . . . a motor vehicle on "a road"—Car not used—Whether "used" —Car immobilised in road—Road Traffic Act*, 1930 (20 & 21 *Geo.* 5, *c.* 43), *s.* 35 (1).
Statute—Construction—Mischief aimed at— "Use" of a motor-vehicle—Road Traffic Act, 1930, *s.* 35 (1).
Elliott *v.* Grey - - - **Divl.Ct. 367**

SALE OF GOODS—*Lien of unpaid seller—Transfer to buyer of document of title—Transfer by him to sub-buyer of new document of title—Goods at wharf sold to buyer for resale —Delivery order by seller in favour of buyer —Fresh delivery order by buyer on resale—Effect on unpaid seller's right of lien—Sale of Goods Act*, 1893 (56 & 57 *Vict. c.* 71), *ss.* 25 (2), 47, *proviso.*
D. F. Mount Ltd. *v.* Jay & Jay (Provisions) Co. Ltd. - - - **Salmon J. 159**

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SECRETARY OF STATE FOR COLONIES —Custodian of Northern Rhodesia, whether. See Habeas Corpus.

SHIPPING—*Bill of lading—Seaworthiness—Hague Rules—Damage to cargo due to defective storm valves—Negligence of workman of independent contractor — Whether shipowner liable for lack of due diligence—(Australian) Sea Carriage of Goods Act*, 1924 (*No.* 22 *of* 1924)—*Carriage of Goods by Sea Act*, 1924 (14 & 15 *Geo.* 5, *c.* 22), *Sch., art. III, r.* 1, *art. IV, r.* 2 (*a*).
Ships' Names—Muncaster Castle.
Negligence — Safe system of work — Plant and equipment — Latent defect — Principle governing employer's liability.
Vicarious Liability — Delegate or independent operator—Specialised work—Liability of principal in contract or tort for due care — Whether liable for negligence of independent contractor.
Riverstone Meat Co. Pty. Ltd. *v.* Lancashire Shipping Co. Ltd. - - **C.A. 536**

2. —— *Charterparty — Demurrage — Exceptions clause — Charterers excused if loading of cargo delayed by "force majeure, . . . "strikes, . . . or any other hindrance of "whatsoever nature beyond the charterers' "control" — Strike preventing loading at nominated port—Duty of charterers to make fresh nomination — Alternative cargoes — "Weather working days" — Treatment of Saturdays.*
Shipping—Charterparty—Cargo—Alternative cargo—Loading of intended cargo delayed—Duty of charterer to exercise alternative cargo option — Burden of proving that alternative cargo could have been shipped.

SHIPPING—*continued.*

Shipping — Charterparty — Demurrage — Exceptions clause—Charterers excused if loading "of the cargo or the intended cargo" delayed by "force majeure, . . . strikes, . . . "or any other hindrance of whatsoever nature "beyond the charterer's control"—Strike at nominated port—Direction of Canadian Wheat Board preventing loading of cargo intended by charterers—Whether bound to load alternative cargo—Whether bound to nominate alternative port—"Weather working days"—Treatment of Saturdays—Reversible lay days—Dispatch payable on "time saved including Sundays."

Shipping - Charterparty — Arrived ship — Ship prevented from arriving because no cargo available.

Shipping—Charterparty—Cargo, obligation of charterer to provide—Ship unable to become an arrived ship unless cargo immediately available—Exceptions clause.

Contract — Frustration — Strike — Whether frustrating charterparty.

Election or Option—Election or selection—Charterparty — Right to nominate — Cargo — Port.

Words and Phrases — "Cargo or intended "cargo." "Force majeure." "Other hindrance "beyond charterer's control." "Weather "working day." "Working day." "Rever-"sible." "Time saved."

Ships' Names—Queen City. Riverton. Cape Rodney. Agostino Bertani. Moderator.

Reardon Smith Line Ltd. *v.* Ministry of Agriculture, Fisheries and Food. Garibaldi Societa Cooperative Di Navigazione A.R.L. *v.* President of India. Carlton Steamship Co. Ltd. *v.* Ministry of Agriculture, Fisheries and Food. Cape of Good Hope Motor Ship Co. Ltd. *v.* Same. Miramar Compania Naviera S.A. *v.* Government of the Union of South Africa - **McNair J. 439**

3. —— —— —— —— *Charterparty providing for shipment of wide variety of cargo in Coos Bay/British Columbia range—Exceptions clause excusing charterers from "any delay if "the cargo intended for shipment . . . cannot "be . . . loaded . . . by reason of . . . strikes ". . ."—Strike preventing loading of intended cargo of lumber—Extent of delay covered by clause — Charterers' duty to provide alternative cargo within reasonable time—Meaning of "cargo, the"—Intended cargo.*

Ships' Names—Niki.

Election or Option—Election or selection—Charterparty—Alternative cargoes.

South African Dispatch Line *v.* Owners of the Panamanian Steamship Niki **C.A. 518**

SLANDER—Counterclaim against sovereign plaintiff. See Conflict of Laws 2.

SOVEREIGN IMMUNITY—Claim for money lent. See Conflict of Laws 2.

STATUTE — Construction — Subsequent enactments. See Rates and Rating 2.

SUBPOENA DUCES TECUM—Late service. See Crown.

SURCHARGE—District auditor. See Local Government.

THIRD PARTY INSURANCE—"Use" of motor-vehicle. See Road Traffic.

TOWN AND COUNTRY PLANNING — *Enforcement notice—Form—Validity—Notice reciting development without permission—Whether permission under Order of 1950, permission under Part III of Act of 1947—Whether enforcement notice valid—Town and Country Planning General Development Order,* 1950 (*S.I.* 1950, *No.* 728), *art.* 3 (1), *Sch. I, Class IV,* 2—*Town and Country Planning Act,* 1947 (10 *&* 11 *Geo.* 6, *c.* 51), *ss.* 12, 13 (1), 23 (1).

Cater *v.* Essex County Council **Divl.Ct. 424**

2. —— —— *Justices' jurisdiction—Question whether permission to develop necessary — Limited permission already given—Town and Country Planning Act,* 1947 (10 *&* 11 *Geo.* 6, *c.* 51), *s.* 23 (4) (*a*).

Town and Country Planning—Development — Planning permission — Whether appellants estopped from contending that there has been no development by reason of prior application for and grant of planning permission—Town and Country Planning Act, 1947, *s.* 23.

Mounsdon *v.* Weymouth and Melcombe Regis Borough Council - - **Divl.Ct. 645**

TRESPASS—Damage to corporation property. See Local Government 2.

VEXATIOUS LITIGANT — Matters to be taken into consideration. See Practice and Procedure.

WEEKLY TENANCY—Repairs. See Landlord and Tenant 3.

WRIT — Service out of jurisdiction. See Practice and Procedure 2.

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